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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 385

PUERTO RICO TELEPHONE COMPANY,
Petitioner,

vs.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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APPENDIX A.

UNITED STATES COURT OF APPEALS,

For the First Circuit.

Nos. 7456, 7457, 7458.

ROSA M. FIGUEROA DE ARROYO, et al.,
Plaintiffs, Appellants in No. 7457,

v.

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, et al.,
Defendants, Appellants in No. 7456,

and

PUERTO RICO TELEPHONE COMPANY,
Defendant, Appellant in No. 7458.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

April 17, 1970.

COFFIN, *Circuit Judge.* Plaintiffs are seven telephone operators formerly employed by defendant Puerto Rico Telephone Company [hereinafter "Company"] at Mayaguez and members of defendant Sindicato de Trabajadores Packinghouse, AFL-CIO, and its local affiliate, Local 963

[hereinafter collectively "Union"]. They were discharged by the Company—one in September 1963 and the other six in April 1964—allegedly in contravention of the seniority provisions of the collective bargaining agreement between the Company and the Union. They immediately communicated the fact of their discharge to the Union but after the Union failed to take their claims through the grievance procedure, the plaintiffs filed suit, on November 22, 1965, against both the Union and the Company.[1]

A first jury returned special verdicts that the Company's dismissal of plaintiffs had violated the seniority provisions, and that plaintiffs had properly submitted their claims to the Union. A second jury found that the Union had breached its duty of fair representation—with regard to six of the seven plaintiffs—and awarded plaintiffs varying amounts for lost earnings, allocated in varying portions between the Company and the Union.

The Union appeals from the finding of a breach of its duty of fair representation and the assessment of damages; the Company appeals from the finding of improper discharge, the finding that the Union had breached its duty, and the assessment of damages; and the plaintiffs appeal on the ground that additional elements of damages—including reinstatement—should have been awarded. We consider the appeals in that order.

The Union's Duty of Fair Representation.

"Fair representation", conceived in a racial discrimination context in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), has matured into a broader obligation for

1. Subject matter jurisdiction against the Company is founded on § 302a (sic) of the Taft-Hartley Act, 29 U. S. C. § 185(a) (1964), and against the Union on 28 U. S. C. §§ 1331, 1337 (1964). *See Brady* v. *Trans World Airlines, Inc.*, 401 F. 2d 87, 94 (3d Cir. 1968), *cert. denied*, 393 U. S. 1048 (1969).

unions, most recently articulated in *Vaca* v. *Sipes*, 386 U. S. 171 (1967). *Republic Steel* v. *Maddox*, 379 U. S. 650, 652-653 (1965), had established that an employee under a collective bargaining agreement which provides exclusive remedies for breaches of that agreement must attempt to exhaust those contractual remedies before resorting to the courts. *Vaca* then made clear that the employee could overcome the employer's defense of failure to exhaust contractual remedies by proving that the employer had repudiated those remedies, or that the Union had—by a breach of its duty of fair representation—prevented the employee from exhausting those remedies, or that there was some other valid reason why the contractual remedies could be disregarded. *Vaca* v. *Sipes*, *supra* at 184-186; *see Vaca* v. *St. Louis-S. F. R. Co.*, 393 U. S. 324, 329-331 (1969). Plaintiffs here sought to overcome this "exhaustion of contract" barrier by attempting to prove that the Union's "unfair representation" prevented the requisite exhaustion.

Vaca held that an employee does not have an absolute right to have his grievance taken through the grievance procedure;[2] unless the contract otherwise provides, the union has a range of discretion within which to determine that an employee's grievance is without merit. *Vaca* v. *Sipes*, *supra* at 181-193. Instead, the employee must prove arbitrary or bad faith conduct—variously referred to as the absence of honest purpose and judgment and or the presence of hostility or discrimination—on the part of the union in order to prove that it has breached its duty. *Vaca* v. *Sipes*, *supra* at 190, 193; *Humphrey* v. *Moore*, 375 U. S.

2. While *Vaca* dealt with a union's refusal to take a processed grievance to arbitration, we see no reason to differentiate between the step of arbitration and earlier steps in the grievance procedure. The same principle applies: when the contract gives the union exclusive control over a grievance, the union must have that control in order for the whole process to function smoothly and effectively, which logic surely applies to all stages of the grievance procedure. *See* Comment, 17 Buffalo L. Rev. 165, 176-177 (1967).

335, 349-350 (1964); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337-338 (1953). However, while due care has not been made a part of the union's duty, the Court has "accept[ed] the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca* v. *Sipes*, *supra* at 191, 194; *see also Republic Steel* v. *Maddox*, *supra* at 652.

Applying this multifaceted standard of fair representation to our case, we can rule out any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials in failing to press plaintiffs' grievances. Mr. Sanchez—the Union official who was responsible for the Union's action in this case—appears from the record as a dedicated Union leader and legislator of manifold responsibilities. However, we are still left with the Court's recognition that arbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation.

This case reveals such handling. There was no evidence as to any plaintiff except Elsie Lugo[3] that the Union ever investigated or made any judgment concerning the merits of her grievance. *See Local Union 12, United Rubber Workers* v. *N. L. R. B.*, 368 F. 2d 12, 17-18 (5th Cir. 1966). Its entire attention during 1964 centered on an NLRB proceeding aimed at preventing the Company from contracting out work involving the installation of new equipment. Just before the six plaintiffs were dismissed in April 1964, the trial examiner made his report which explicitly confined its relief to those dismissed because of subcontracting, to

3. The second jury's finding that the Union fulfilled its duty of fair representation with regard to Miss Lugo is supported by evidence that the Union pressed her grievance to impasse immediately after her dismissal in September 1963. This failure to prove that the Union's unfair representation prevented her from exhausting contractual remedies bars her recovery against the Company in this case. *See* discussion in text *supra*.

which the Union filed no exceptions. In the face of that report and clear evidence that plaintiffs were dismissed because of automation rather than subcontracting, the Union president inexplicably concluded that the NLRB proceeding would adequately protect plaintiffs' rights. Clearly the jury was warranted in finding that the Union's failure to press plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them.[4]

The Union's suggestion that its pressing of these grievances during the pendency of the NLRB proceeding would somehow have jeopardized that avenue of relief is completely without merit. There is nothing inconsistent in trying to protect the jobs of the more senior employees vis-a-vis the less senior employees in one forum, while trying to protect the jobs of a larger number of employees vis-a-vis outside employees in another forum. Moreover, it is obvious that the Union does not breach its duty when it presses legitimate seniority claims, even though the effect of success is to jeopardize the jobs of those defined by the contract as less senior.

Finally, the Union—joined by the Company—insists that the six plaintiffs discharged in April 1964 failed to specify the seniority basis for their grievances when they complained to the Union. It is true that these plaintiffs did not testify that they told either Miss Acevedo, the local Union delegate, or Mr. Sanchez that less senior employees had been retained when they had been discharged. However, Miss Acevedo, who undoubtedly knew all 30 telephone operators in the Mayaguez unit, forwarded to Mr. Sanchez not only plaintiffs' names but their dates of hiring, which indicated that five had worked over three years and two

4. The defendant's argument that the charge erred in focusing solely on the Union's action in failing to process the grievances might have been well taken had there been any rational basis for relying solely on the NLRB proceeding.

had worked over ten years. Almost identical communication had been sufficient to initiate the seniority grievance for Miss Lugo, the least senior of the seven plaintiffs who was discharged in September 1963 and whose grievance was pressed by the Union. Moreover, the Union had been informed just before these dismissals that they would occur because of the new automatic dialing system, so that seniority was the only possible basis for a grievance. Had the Union given anything but the most perfunctory attention to these grievances, it would have been obvious that they raised a seniority claim. We are satisfied, therefore, that the jury could have found that these seniority grievances were submitted to the Union in compliance with the appropriate provision in the collective bargaining agreement.[5]

Accordingly, we conclude that the jury was entitled to find that the Union's failure to press the six plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them, and thus a breach of its duty of fair representation preventing an exhaustion of contractual remedies and enabling these six plaintiffs (*see* n. 3) to maintain their suit against the Company.

The Statute of Limitations.

The Union contends, however, that even if it breached its duty of fair representation, plaintiffs' suit against it is barred by the one-year Puerto Rico statute of limitations for tort claims, 31 L. P. R. A. § 5298, since the Union's breach occurred over 19 months before plaintiffs filed suit

[5] The Company's argument that the plaintiff's failure to speak with a Company representative within 48 hours of dismissal bars this suit would require a strained interpretation of the collective bargaining agreement resulting in a substantial pyramiding of efforts whose only apparent advantage in a dismissal case would be the insulation of the Company from litigation because of technical oversights by the employee.

on November 22, 1965. However, while *Auto Workers* v. *Hoosier Corp.*, 383 U. S. 696, 701-705 (1966), established that § 301 suits should be governed by the state statute of limitations rather than some implied federal limitation period, the question left undecided for purposes of our case is which Puerto Rico statute of limitations applies to an employee's suit against his union for breach of its duty of fair representation, when such suit is a part of the employee's suit against his employer for breach of the collective bargaining agreement.

At the outset it seems clear that the union's duty of fair representation to those it represents cannot be considered a "contractual" duty because of the contractual relation between the union and the employer. This approach was persuasively rejected in *Nedd* v. *United Mine Workers*, 400 F. 2d 103, 105-106 (3d Cir. 1968), which view is surely correct, for, as in our case, the Union's breach was not its mere failure to submit plaintiffs' grievances in compliance with the contract but rather its arbitrary, perfunctory failure to do so.

Another argument for treating plaintiffs' suit as a contractual claim is that it is their obligations of membership in the Union which generate the reciprocal obligation by the Union to perform its statutory duty of fair representation. This duty, however, imposed and defined by federal labor policy, is not capable of being bargained away by workers even though a written contract or union by-laws might so provide. Moreover, the Union, once certified, is the bargaining agent for all employees in the bargain unit, including the non-union employees. It would be bizarre indeed if the non-union employees were considered to have a tort claim for unfair representation, with generally a

shorter limitations period, while union members' claims sounded in contract and were thus subject to a longer limitation period.

It might also be argued that the employee's claim against his union should be characterized as a "contract" action whenever the employee's suit also states a claim against his employer for breach of contract, because the principal relief sought is normally reinstatement and back wages from the employer and the union may only be a party in order for the employee to overcome the employer's "exhaustion of contract" defense. However, this view which considers the two claims as essentially inseparable is also unsatisfactory.

First, it would mean that in a given state, the employee's suit against his union for "unfair representation" would be subject to a different statute of limitations depending on whether the employee had joined his employer in the same lawsuit. More importantly, the "inseparability" rationale does not bear inspection. Obviously quite different evidence and legal argument will be addressed to the two claims. Moreover, the employee may well have a substantial claim for damages against the union which far exceeds the potential recovery against the employer, thereby destroying the premise that the claim against the union is only incidental to the more important breach of contract claim against the employer.

Finally, we detect nothing in the federal labor policy which necessitates this rather strained view of the employee's claim against his union and his employer. While the viability of the grievance procedures erected by the collective bargaining agreement may require the employee to show, as a prerequisite to his suit against his employer, that he was prevented from exhausting those contractual remedies by the union's "unfair representation", *Republic*

Steel v. *Maddox*, *supra* at 652-653; *Vaca* v. *Sipes*, *supra* at 184-185, nothing therein requires that the union actually be *liable* for such breach.[6] Indeed, an employee could sue his employer under § 301 and overcome the "exhaustion" defense by showing wrongful prevention by the union without ever formally joining the union in that suit. *Vaca* v. *Sipes*, *supra* at 186; *Serra* v. *Pepsi-Cola General Bottlers, Inc.*, 248 F. Supp. 684, 688 (N. D. Ill. 1965); *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, 288 F. Supp. 874, 876 (E. D. La. 1968); *cf. Czosek* v. *O'Mara*, ... U. S. ..... (1970).

We are therefore satisfied that any effort to characterize plaintiffs' suit against the Union as a "contract" action is both unsound and unnecessary in order to effectuate existing federal labor policy. Moreover, the Union's duty seems more akin to, though less rigorous than, the duty of due care normally associated with tort actions. Finally, we detect in *Hoosier Corp.* a distinct preference for the shorter statute of limitations where the question of characterization is a close one and no manifest injustice results from such choice, which preference suggests the tort limitations period in most jurisdictions.

6. The Company insists that unless the Union is governed by the same statute of limitations as it is, a union may deliberately refuse to press grievances in order to provide the employee who is willing to wait out the Union's shorter statute of limitations with an opportunity to take his claim to a jury in a § 301 suit—with the Union's "unfair representation" conceded but immunized—rather than to an arbitrator at the end of the grievance procedure, which possibility allegedly circumvents our federal labor preference for arbitration. We cannot deny such possibility exists, although such union conduct might constitute either an unfair labor practice, *see* n. 7, or a breach of the labor contract actionable by a § 301 suit by the employer. Moreover, it is difficult to see the real quid pro quo for the employee in such circumstances, for the damages flowing from any contractual breach become more attributable to the union's conduct than to the employer's initial breach. In short, we discount the likelihood while acknowledging the possibility, leaving it to Congress to enact some statute of limitations applicable to both employer and union. *See* text, *infra*.

One other possibility must be explored. Since the employee's suit against the union is *not* founded on the labor contract, the suit may not be a § 301 suit and thus *Hoosier Corp.* may not be applicable. Even assuming the plaintiffs' claim against the Union is not a § 301 suit, we think the logic of *Hoosier Corp.* dictates the adoption of express state statutes of limitation in the absence of an express federal limitation period. The question becomes whether there is any express federal limitation period governing an action against a union for breach of its duty of fair representation. Since the Union's breach may be an unfair labor practice,[7] the statutory six-month limitation period for such practices—29 U. S. C. § 160(b)—could be deemed applicable to an employee's suit against the union. However, since *Vaca* v. *Sipes* established that Federal labor policy does not require that individual suits be preempted simply because the NLRB might also be able to prosecute unions for such conduct, we see no reason why such private litigation *must* be limited by the same period as the NLRB is. By giving individual employees a period longer than the NLRB's six months, we encourage initial recourse to the Board without precluding a subsequent civil suit if the Board refuses to pursue the matter for the individual employee. Moreover, the individual suit is still analogous to an ordinary tort action regardless of the Board's concurrent jurisdiction.

We therefore conclude that plaintiffs' action against the Union in our case is properly characterized as a tort action and is therefore barred by the one-year limitation period

7. *Miranda Fuel Co.*, 140 NLRB 181 (1963), *enforcement denied*, *NLRB* v. *Miranda Fuel Co.*, 326 F. 2d 172 (2d Cir. 1963) (*not* an unfair labor practice); *Local 12, United Rubber Workers* v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966); *cert. denied*, 389 U. S. 837 (1967) (unfair labor practice); *Truck Drivers and Helpers, Local Union 568* v. *NLRB*, 379 F. 2d 137 (D. C. Cir. 1967) (unfair labor practice).

for tort claims arising in Puerto Rico. However, as we made clear above, we do not believe that the Union's immunity from suit for the breach of its duty of fair representation has any bearing whatever on plaintiffs' suit against the Company for improper discharge, the "exhaustion" defense having been overcome as to six of these plaintiffs by proof of the Union's breach.

While we are satisfied that the proper legal analysis of the union's and employer's duties in cases such as this requires the imposition of different state statutes of limitations, we are equally convinced that Congress would be well advised to enact a federal statute of limitations to deal with both kinds of claims asserted here.

The Propriety of the Discharges.

The issue of the adequacy of the evidence to support the special verdicts that the Company discharged plaintiffs in violation of the seniority clause is a close one. Plaintiffs' counsel failed to resort to pre-trial discovery while Company counsel appears to us to have taken refuge in an ambiguous court order to refuse to make available records of four of the plaintiffs. Plaintiffs' counsel briefed this issue superficially; Company counsel briefed it exhaustively, but, understandably, not with complete objectivity.

Our standard of review are the seniority clause itself[8] and the adequacy of the evidence to support the jury's findings that plaintiffs had carried their burden to show by a preponderance of the evidence that they were as

8. "Seniority shall prevail if the qualifications of all the employees to be considered are equal, but shall not be used against any employee that because of his ability, competence, efficiency and better service record proves to be more useful than some other that has merely been employed for a longer period of time."

useful as a less senior employee.[9] We require more than a scintilla. *See Magnat Corp. v. B&B Electroplating Co.*, 358 F. 2d 794, 797 (1st Cir. 1966).

The case for the six plaintiffs who overcame the defense of failure to exhaust contractual remedies consisted of three components. The first was the testimony of each that she deemed herself useful and had no problems with her supervisors, and that a number of retained operators were junior to her. The second was the admission by Mrs. Ramonita Padovani, the Chief Operator for the Company who had made the selection of operators to be discharged, that each plaintiff was a good employee whose return was desirable. The third—and sole source of comparisons between plaintiffs and those who were retained—was the testimony of Mrs. Iris Torres de Hernandez, the former assistant to the chief Mayaguez operator for the Company, who had been laid off seven months prior to the discharges. She offered her individual assessment of each plaintiff and of some eleven other operators, all of whom were less senior than four of the plaintiffs and at least four of whom appeared from the evidence to be less senior than the remaining two plaintiffs.[10] Such testimony tended to prove that all six plaintiffs were as useful as four or more of the less senior employees. In addition, Mrs. Hernandez testified that, in her opinion, those plaintiffs were more useful than the less senior retained operators.

The Company contends that this testimony falls short of a prima facie case for plaintiffs because, in its view,

9. Plaintiffs continue to argue in brief that defendants had the burden to show that the operators retained were more efficient than plaintiffs. But the charge of the court to the contrary was not excepted to.

10. The jury could have found that Sonia de la Cruz, Elsie Camacho, Perfecta Vazquez and Ruth Soto were all less senior than plaintiff Iris Trabal Quintana, the least senior of these six plaintiffs. The Company, which had the exact length of service of all employees, failed to controvert this testimony of plaintiffs.

Mrs. Hernandez was completely discredited as a witness. Two reasons of a general nature were asserted: that she had left the Company's service seven months before plaintiffs were dismissed, and that she had originally been a plaintiff in the case. Both factors were obviously relevant for jury assessment of her credibility but do not amount to reason for disqualification. So, too, was her heavy—but not unqualified—emphasis on seniority in assessing usefulness.

The Company more specifically relies on its impeachment of Mrs. Hernandez' testimony regarding three of the plaintiffs—Luz Arminda Toro, Andrea Colon Tubens, and Rosa Figueroa. The discrediting of her testimony as to the first two was minor. Her favorable general appraisal of Luz Arminda, an operator for fourteen years, was not necessarily discredited by evidence of two prior critical reports of the latter's performance at a period when operators were under some pressure in converting to a new system. Her favorable assessment of Andrea Colon was not contradicted simply because the latter has missed 200 days of work arising from an illness from which she had since recovered.

The cross-examination of Mrs. Hernandez focused primarily on her evaluation of Rosa Figueroa. Mrs. Hernandez had testified that she had never had any complaints about her. On cross-examination, based on her performance file, Mrs. Hernandez had to concede a series of critical comments in 1961, in 1962, and in 1964. The criticisms made in 1961 and 1962 impress us less on close analysis, partly because they seem for the most part to be minor and technical (e.g., "incorrect busy test on several occasions") and partly because the Company inexplicably omitted all of the comments made as to Rosa Figueroa in 1963—which were generally commendatory. The pattern is consistent with Mrs. Hernandez' observation that she was improving. However, the evidence of criticisms made in 1964, after Mrs. Hernandez had left the Company, is

more significant and more adverse. In the first three months of 1964, overall criticism as to Rosa Figueroa's attitude and unbusinesslike conduct were noted, culminating with a serious complaint from a subscriber. These were unrebutted.

In our view this adverse evidence, uncontroverted by plaintiff Figueroa, is so substantial in relation to the favorable evidence that we can only conclude that the jury could not reasonably have found that she was as useful as any of the less senior retained employees. The Company could have attempted to introduce such evidence as to the other plaintiffs, but did not. Insofar as Mrs. Hernandez was impeached, her assessment was destroyed only as to Figueroa, not so much by her statement about lack of complaints as by the evidence of performance after her separation. The evidence is admittedly not so specific or precise as we should like or as could have been obtained through discovery but we think it is sufficient and that the matter should rest with the jury's verdicts, except as to Rosa Figueroa.

Damages.

The Company is therefore liable for damages to all plaintiffs except Rosa M. Figueroa and Elsie Lugo Bernier (*see* n. 3). The Union is immune, because of the running of the applicable statute of limitations, from any liability for its breach. The initial problem is to determine the amount of lost earnings properly chargeable to the Company. Neither the Company nor the Union contested the total amount found by the jury as lost earnings for these five plaintiffs incurred up to the date of judgment.[11]

11.

Plaintiff	Lost Earnings
Andrea Colon Tubens	$11,981.93
Iris Trabal Quintana	6,851.86
Luz Arminda Toro Tirado	3,454.28
Carmen de la Rose de Ortiz	2,654.32
Elsie Torres Ramos	5,628.60

We look again to *Vaca v. Sipes*, this time for guidance on the allocation of lost earnings where the Company improperly discharges and the Union unfairly represents. *Vaca* establishes that only the Company is liable for damages attributable solely to its breach of contract, while the "increases if any in those damages caused by the union's refusal to process the grievance should not be charged to employer." *Vaca* v. *Sipes*, *supra* at 197-198; *see also Czosek* v. *O'Mara*, *supra* at . . . In a case such as ours, where there has been no suggestion that the Union participated in the Company's improper discharge, and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge. Thus, the entire amount of lost earnings of each plaintiff, *see* n. 11, is properly charged to the Company.

Additionally, plaintiffs request an award of prejudgment interest on their "lost earnings" recovery. Such interest has been awarded by the NLRB in back pay cases—*e.g.*, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)—and enforced by decisions from at least seven circuits. *See N.L.R.B.* v. *Local 138, Operating Engineers*, 385 F. 2d 874, 878 (2d Cir. 1967), and cases cited therein, n. 22. Courts have also awarded such prejudgment interest in cases where the National Railroad Adjustment Board ordered reinstatement and back pay without mention of any interest recovery. *Raabe* v. *Florida East Coast Railway Co.*, 259 F. Supp. 351, 356 (M. D. Fla. 1966); *Diesinger* v. *Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 278 F. Supp. 211, 213 (E. D. Wis. 1968); *compare Laday* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 299 F. Supp. 580, 581 (E. D. Wis. 1969).

Such decisions are sound where, in an effort to "make whole" the improperly discharged employee an administrative agency ascertains actual wages lost and the agency or the court supplements them by interest from the date such wages should have been paid. But where a jury has made an award for lost earnings, we think it inappropriate for a judge to attempt to assess interest. In many cases the jury's verdict would not supply the basic data of dates and amounts on which interest could fairly be computed. Were we to brook an exception where, as here, the precise computation of the plaintiffs was accepted by the jury, we would in effect be conditioning the right to interest on the happenstance of a precise stipulation precisely followed by a jury. We therefore agree with the action of the district court in refusing to award prejudgment interest.

As compensation for damages incurred *after* the date of the district court's judgment, plaintiffs seek either reinstatement or money damages for future lost earnings, both of which were denied by the district court. Reinstatement has been ordered by various federal courts in suit arising under the Railway Labor Act. *E.g., Brady* v. *Trans World Airlines, Inc.*, 244 F. Supp. 820, 822 (D. Del. 1965), *aff'd*, 401 F. 2d 87, 102-103 (3d Cir. 1968) *cert. denied*, 393 *U. S.* 1048 (1969), *reh'g denied*, 394 U. S. 955 (1969); *Raabe* v. *Florida East Coast R. Co.*, *supra* at 354. The Company insists, however, that the Norris-LaGuardia "anti-injunction" provisions, 29 U. S. C. §§ 101-115—inapplicable to suits under the Railway Labor Act, *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 41-42 (1957)—bar reinstatement in § 301 suits under the National Labor Relations Act. We disagree.

The Company's literal interpretation of section 4(a) of

the Norris-LaGuardia Act [12] completely disregards the primary purpose behind the anti-injunction provisions, "to protect working men in the exercise of organized, economic power . . . to correct existing abuses of the injunctive remedy in labor disputes . . . to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital." *Trainmen* v. *Chicago R. & I. R. Co.*, *supra* at 40-41; *see Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 202-203 (1962). Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 310 F. 2d 513, 517-518 (7th Cir. 1962), *aff'd on other grounds*, 372 U. S. 284 (1963); *Retail Clerks Union Local 1222* v. *Alfred M. Lewis, Inc.*, 327 F. 2d 442, 446 (9th Cir. 1964); *see Local Union No. 328* v. *Armour and Co.*, 294 F. Supp. 168 (W. D. Mich. 1968); *but see Clune* v. *Publishers' Ass'n of New York City*, 214 F. Supp. 520, 528 (S. D. N. Y. 1963), *aff'd on lower court opinion*, 314 F. 2d 343 (2d Cir. 1963). The "remain in any relation of employment" language in section 4(a), which forms the basis of the Company's literal interpretation, was used, we think, simply to make clear that employee strikes could not be enjoined either if the employees claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer. Moreover, the drafters did specifically include employers when protection was intended for them. *See* section 4(b), 29 U. S. C. § 104(b). Finally,

12. "No court of the United States shall have jurisdiction to issue any . . . injunction . . . to prohibit any person . . . from . . .

(a) Ceasing or refusing . . . to remain in any relation of employment," 29 U. S. C. § 104(a).

It is possible to read this provision as prohibiting a federal court from enjoining an employer from refusing to reemploy a former employee, even an improperly discharged one.

the reemployment of improperly discharged employees can hardly be said to be one of the abuses sought to be eliminated by the Norris LaGuardia Act. *See* section 2, 29 U. S. C. § 102; *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 458 (1957). We therefore hold that the remedy of reinstatement in a § 301 suit is not barred by section 4(a) of the Norris-LaGuardia Act.

Absent Norris LaGuardia Act restraints, the rationale of *Bradley* v. *Trans World Airlines, Inc., supra*, applies with equal force under the NLRA. We fail to discern any reason why reinstatement is not a perfectly acceptable form of relief for § 301 suits against the employer. *See Serra* v. *Pepsi Cola General Bottlers, Inc., supra* at 688; *Rivera* v. *NMU Pension & Welfare & Vacation Plan, supra* at 877. In many such cases, reinstatement would have been the likely remedy had the grievance been taken through the grievance procedure as it should have been. *E.g., Machinists, District No. 8* v. *Campbell Soup Co.*, 406 F. 2d 1223 (7th Cir. 1969). It is unrealistic to assume that the injury to the improperly discharged employee continues only up to the date of the district court's judgment. In the normal case, reinstatement constitutes one form of prospective relief which has some assurance of making the employee whole while avoiding the difficult problem of quantifying future lost earnings.

By concluding that reinstatement is an appropriate remedy in a § 301 suit, we do not mean to suggest that it must be ordered in every such case. First of all, there may be some cases in which no prospective relief is warranted.[13]

13. *E.g.*, where the employer can demonstrate that the employee would have been properly discharged at some point prior to the date of judgment, or where it appears that the employee had by the date of judgment obtained equivalent employment which mitigated all prospective injury, from the improper discharge, neither of which has been suggested by the Company as having occurred in our case. The Company's sole contention in this regard, that no prospective relief should be granted because

Yet in our case the jury's total award for lost earnings to the date of trial has not been contested, and since there was no evidence that the "loss of employment" injury suffered by plaintiffs as a result of their wrongful discharge suddenly ceased on the date of judgment, it seems likely that plaintiffs' injury continued even after the date of judgment and that some form of prospective relief is appropriate.

Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical both for the Company and for the plaintiffs, particularly if the present seniority clause is a weak one which is likely to generate future controversy concerning these employees. If such impracticality exists, we can see no reason why an award for future lost earnings would not be in order, *Thompson* v. *Brotherhood of Sleeping Car Porters*, 367 F. 2d 489, 494 (4th Cir. 1966), *cert. denied*, 386 U. S. 960 (1967),[14] provided they are apportioned between the Union and the employer along the guidelines of *Vaca*

there was no evidence that plaintiffs were *still* as useful as some less senior employees who were retained in 1964, must be rejected. Even assuming that plaintiffs were no longer as useful, the Company cannot take advantage of its own wrongdoing, for *it* created the situation where some present employees continued to work in place of these plaintiffs who were wrongfully discharged. In similar circumstances, the Third Circuit upheld a lower court order requiring the employer, under much more extreme conditions of obsolescing skills, to train the improperly discharged employee if necessary to return him to the position he would have attained had he not been discharged. *Brady* v. *Trans World Airlines, Inc.*, *supra* at 103.

14. *See also Nichols* v. *National Tube Co.*, 122 F. Supp. 726, 732 (N. D. Ohio 1954), *rev'd on other grounds*, 229 F. 2d 396 (6th Cir. 1956). Nothing in either *Walker* v. *Southern Railway Co.*, 237 F. Supp. 278 (W. D. N. C. 1965), or *Gass* v. *National Container Corp.*, 171 F. Supp. 441 (E. D. Ill. 1959), persuades us that the Fourth Circuit's *Thompson* decision should not be followed. While *Vaca* may indicate a different apportionment of damages than that made in *Thompson*, nothing in *Vaca* suggests that properly apportioned future damages are an improper remedy.

v. *Sipes*, *supra* and *Czosek* v. *O'Mara*, *supra*. Moreover, we think it makes good sense to give the district court an alternative to reinstatement in those cases where some prospective relief is warranted.[15] *Textile Workers* v. *Lincoln Mills*, *supra* at 456-457. The admittedly difficult problems of quantifying future lost earnings should not be allowed to preclude any prospective remedy or to force the parties to accept the more drastic remedy of reinstatement. Of course the employee will only be entitled to recover from the Company for those damages which are reasonably attributable to the discharge and which could not have been mitigated by engaging in substantially equivalent employment.

In this case it is unclear why the district court denied any form of prospective relief. We therefore remand this aspect of the damages question for the district court either to order reinstatement or to submit to a jury, after the taking of evidence, the question of the amount of future lost earnings.

Plaintiffs also seek an award of reasonable attorney's fees. While federal courts have awarded attorney's fees as a part of the successful plaintiff's recovery in the labor relations context in the absence of express statutory authorization[16] and while we are inclined to think that such

15. We recognize that the record below contains little evidence from which future damages could have been calculated. However, there was sufficient evidence to justify a reinstatement order. Since the case must be remanded for new consideration of the propriety of reinstatement, we think it would be unfortunate both for the Company and the plaintiffs if the district court were forced to choose between reinstatement and no prospective relief in a case where some such relief seems warranted.

16. *E.g.*, *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473, 481 (4th Cir. 1951) (attorney's fees awarded to employee for union's breach of duty of fair representation); *Gartner* v. *Soloner*, 384 F. 2d 348 (3d Cir. 1967), *cert. denied*, 390 U. S. 1040 (1968) (attorney's fees to union member under § 102, LMRDA); *Sheet Metal Workers, Local 223* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101, 109-110 (5th Cir. 1967) (attorney's fees awarded to employer

relief could be appropriate in a § 301 suit such as this one,[17] we think the circumstances presented in this case preclude such relief. Normally such relief should be charged against the union, for its failure to utilize the grievance procedure on the employee's behalf is what necessitated his resort to the Courts. However, in our case the Union is immune from liability because of the statute of limitations, and we can find no substantial evidence that the Company could be said to have frustrated the grievance procedure with regard to the plaintiffs still before us. For these reasons, the court's denial of such award is affirmed.

Finally, we are satisfied that the plaintiffs' request for "mental damages" was properly denied. We think this is a matter of federal labor law and while we can conceive of extreme conduct by either the employer or the union which might in some cases warrant such an award, it seems clear that ours is not that exceptional case. *Cf. Brady* v. *Trans World Airlines, Inc.*, 244 F. Supp. at 822.

The case is remanded to the District Court to enter judgment against the Company for past lost earnings in accordance with this opinion and to determine the propriety of reinstatement or future lost earnings.

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under § 303, NLRA); *Gulf Coast Bldg. & Const. Trades Council* v. *E. R. Hoar & Son, Inc.*, 370 F. 2d 746, 748 (5th Cir. 1967) (same).

17. Mr. Justice Black, dissenting in *Vaca* v. *Sipes*, *supra* at 210, eloquently described the difficult route left open to the employee in this predicament. Moreover, the alleged wrong inflicted on the employee, loss of employment in violation of contractual rights; the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts to obtain redress; and the ultimate purpose behind any recovery in such a case, making the employee whole, all suggest that the employee may need some financial assistance to press his claim and, if successful, should retain a substantial portion of the jury's "lost earnings" award for himself. Finally, the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and or the employer to utilize the contractual grievance procedures designed to remedy breach of contract claims without resort to the courts.

APPENDIX B.

Rosa M. Figueroa-De Arroyo, Iris Torres De Hernandez, Andrea Colon Tubens, Iris Trabal Quintana, Jose A. Franqui, Luz Arminda Toro Firado, Benjamin Torres Rivera, Carmen E. De La Rosa De Ortiz, Elsie Torres Ramos, Alfredo Morón Irizarry and Elsie Lugo Bernier,

Plaintiffs,

v.

Sindicato De Trabajadores Packinghouse, AFL-CIO, Distrito De Puerto Rico, Puerto Rico Telephone Company and Union De Empleados De La Industria Del Telefono De Puerto Rico, Local 963,

Defendants.

} Civ. No. 511-65.

UNITED STATES DISTRICT COURT,

D. Puerto Rico.

Aug. 8, 1969.

RULING ON POST-TRIAL MOTIONS AND MEMORANDUM.

HENRY N. GRAVEN, *Senior District Judge* (By Assignment).

In this action, following jury trials, all of the parties made post-trial motions. The background for those motions will be next set forth. The plaintiffs in this action were

all formerly in the employ of the defendant Puerto Rico Telephone Company at Mayaguez. The plaintiffs in this action assert claims against all of the defendants growing out of the alleged wrongful termination of their employment by the defendant Puerto Rico Telephone Company. That defendant was a party to a collective bargaining agreement with the defendant Unions. The two Unions were and are treated as one under that agreement. The defendant Union first named was the over-all Union organization for the Commonwealth of Puerto Rico. The other defendant Union was the local Union for the defendant Puerto Rico Telephone Company. Those defendants will be referred to as the defendant Union or the defendant Unions.

The action was designated by the plaintiffs as a jury case. The action was dismissed without prejudice as to the plaintiffs Iris Torres de Hernandez and Benjamin Torres Rivera for lack of jurisdiction. At the close of the evidence a verdict was directed in favor of the defendants as to the claims of the plaintiffs Jose A. Franqui and Alfredo Moreu Irizarry. Jury trials were had as to the claims of the remaining seven plaintiffs. Those plaintiffs were switchboard telephone operators in the Traffic Department of the defendant Telephone Company. In accord with jury verdicts, judgments for substantial amounts were rendered in favor of each of those plaintiffs. In the case of six of those plaintiffs, judgments were rendered against all of the defendants. In the case of the seventh of those plaintiffs, i.e., Elsie Lugo Bernier, judgment was rendered in her favor only as against the defendant Telephone Company. The claims of those seven plaintiffs are the subject matter of this Memorandum. Hereafter when reference is made to the plaintiffs reference will be to those plaintiffs.

There was a separation as to the trial of the issues. One jury rendered special verdicts as to certain of the issues

and another jury rendered special verdicts as to the remaining issues. The seven plaintiffs and the dates of the commencement of their employment and the termination of their employment by the defendant Telephone Company are next set forth:

Name	Started Working	Was Separated
Rosa M. Figueroa de Arroyo	May 26, 1960	April 3, 1964
Andrea Colon Tubens	May 20, 1953	April 3, 1964
Iris Trabal Quintana	May 15, 1961	April 3, 1964
Luz Arminda Toro	April 21, 1950	April 8, 1964
Carmen E. de la Rosa de Ortiz	August 16, 1956	April 3, 1964
Elsie Torres Ramos	March 27, 1961	April 3, 1964
Elsie Lugo Bernier	June 12, 1961	September 19, 1963

It appears that the number of employees in the Traffic Department was reduced because of the introduction of automatic switching.

At the times here material, there was in effect between the defendant Telephone Company and the two defendant Unions a collective bargaining agreement. Article XX of the collective bargaining agreements was as follows:

"SENIORITY.

"Seniority shall be the full term of service credited to an employee working for the Company as reflected by the Company's records.

"The Company shall take into consideration all the employee's qualifications in the case of promotions and lay-offs in jobs covered by this Agreement.

"Seniority shall prevail if the qualifications of all the employees to be considered are equal, but shall not be used against any employee that because of his ability, competence, efficiency and better service record proves to be more useful than some other that has merely been employed for a longer period of time."

Section 5 of Article XV of the collective bargaining agreement was as follows:

> "*Section 5—Suspended or Laid-off Employees*
>
> "a) If an employee regards his suspension or laying-off as unjust, he shall submit his grievance to the Union.
>
> "b) In case the Union also regards the employee's suspension or laying-off as unjust, the Union shall submit a grievance in writing, within the three (3) days following the employee's suspension or notice of laying off, to the Company's Director of Industrial Relations.
>
> "c) The Company shall have the right to summon the Grievance Committee to a special meeting to settle the grievance.
>
> "d) Once the period of three (3) days from the employe's suspension or notice of laying-off shall have elapsed, the Union shall have no right to file a grievance on said suspension or notice of laying-off and the case shall be regarded as closed.
>
> "e) Any employee that has been suspended or laid-off shall, if his suspension or laying-off is found to be unjustified in the Grievance Committee's judgment, be restored to his old job without detriment to his seniority rights, and the Company shall be required to pay him any money he may have failed to earn during his suspension or laying-off."

It is the claim of the plaintiffs that their employment was terminated by the defendant Telephone Company in violation of the seniority provision of the collective bargaining agreement. It is the claim of the plaintiffs that the defendant Unions wrongfully failed to submit their grievances for such violation to the defendant Telephone Company in accord with the provision of the collective bargaining agreement.

During the times here material, Armando Sanchez Mar-

tinez was president of the defendant Sindicato de Trabajadores Packinghouse, AFL-CIO, Distrito de Puerto Rico, which, as heretofore noted, was the over-all Union organization for the Commonwealth of Puerto Rico.

On September 13, 1963, the defendant Telephone Company was notified in writing by the defendant Union as to its representatives under the collective bargaining agreement. Included among those so designated was Carmen Acevedo. Following her name appeared the word "Traffic". Miss Acevedo was employed in the Traffic Department along with the plaintiffs. There were around 30 employees in the Traffic Department. Promptly upon receiving notice of the termination of their employment, the plaintiffs notified Carmen Acevedo that they deemed themselves aggrieved by the termination of their employment. Mr. Sanchez early learned that the plaintiffs were claiming that they had been aggrieved by the termination of their employment.

The first of the issues between the parties was as to whether the defendant Telephone Company violated the seniority provision of the collective bargaining agreement. In that connection the jury was instructed as follows:

"Instruction No. 4.

"The provisions of Article XX of the collective bargaining agreement have been heretofore set forth.

"That Article does not in any way limit the right of the Company to lay off an employee no longer needed. It had the absolute right to so do. Thus, the right of the Company to reduce the number of employees in its Traffic Department is not involved. What is involved is the selection of employees to be laid off. Under Article XX seniority is only one of the factors to be considered by the Company in selecting the employees to be separated and those to be retained. Seniority is determinative only where the factors of

ability, competence, efficiency, service, and usefulness to the Company are equal.

"Each plaintiff asserts that at the time she was laid off the Company retained in its Traffic Department employees with lesser seniority than she had. Each plaintiff further asserts that she had qualifications equal to those of the employees retained as to ability, competence, efficiency, service, and usefulness to the Company.

"The burden is upon each plaintiff to establish by a preponderance of the evidence that her qualifications in the matters referred to were equal to those who were retained. If she has so established, your answer to Question No. 1 in the special verdict relating to her should be 'yes'. If she has not so established, then your answer to Question No. 1 as to her should be 'no'."

The jury returned special verdicts finding that in the case of each plaintiff the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement. That jury, in addition to finding that the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement as to each of the plaintiffs, also found that the plaintiffs had submitted their grievances to the Union in accord with the provision of the collective bargaining agreement.

Thereafter, there was submitted to another jury the issue as to the defendant Union's conduct in connection with the plaintiffs' grievances and the matter of damages. That jury was instructed, in part, as follows:

"Subsection (b) of Section 5 of Article XV of the collective bargaining agreement provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with that subsection.

"Under the provisions of that subsection, the Union is not required to submit to the Company all griev-

ances of its members relating to layoffs. It is only required to submit such of those grievances which it regards as just grievances. That subsection provides for the exercise of judgment on the part of the Union as to what grievances it will submit to the Company. The requirement of that subsection is that the Union exercise its judgment as to the submission of such grievance nonarbitrarily, nondiscriminatorily and in good faith. If it does so exercise its judgment, it would not have acted wrongfully even though it made a mistake in judgment and an erroneous decision in not submitting to the Company a grievance which in fact was a just grievance.

"In order for the Union to have acted wrongfully in not submitting a grievance to the Company in accord with subsection (b) of Section 5 of Article XV of the collective bargaining agreement, it must have acted either arbitrarily or discriminatorily or in bad faith. The burden is upon each plaintiff to establish by a preponderance of the evidence that the Union did so act.

"* * *

"To act 'arbitrarily' means to act perfunctorily and without heed or regard as to the merits of a particular matter. It also means not governed by principle but acting according to preference, notion, whim or caprice.

"To act 'discriminatorily' means to act unfairly as to one person as compared to others similarly situated.

"To act 'in bad faith' is to act with improper intent, motive and purpose."

Except in the case of the plaintiff Elsie Lugo Bernier, it is undisputed that the defendant Unions did not submit the grievances of the plaintiffs that their employment was terminated in violation of the collective bargaining agreement. In her case the defendant Unions submitted her grievance but it became bogged down in arbitration proceedings.

That jury found that as to each of the plaintiffs, except the plaintiff Elsie Lugo Bernier, the defendant Union had either arbitrarily or discriminatorily or in bad faith failed to submit her grievance to the defendant Telephone Company in the manner and form specified in subsection (b) of Section 5 of Article XV of the collective bargaining agreement. It was just noted that the defendant Union had submitted the grievance of the plaintiff Elsie Lugo Bernier, but through no fault of the defendant Union redress of her grievance was not secured.

Each of the plaintiffs claimed as damages her loss of earnings, the same being the difference between what she would have earned between the time of the termination of her employment and what she did earn up to the time of trial. The jury returned verdicts determining the amount of such loss in the case of each plaintiff.

The defendant Telephone Company asserts that the evidence was not sufficient to sustain the special verdicts of the jury finding that it had violated the seniority provision of the collective bargaining agreement.

The Court is of the view that the evidence is sufficient to support those verdicts.

The defendant Union asserts that the evidence is not sufficient to support the special verdicts of the jury that the plaintiffs, except the plaintiff Elsie Lugo Bernier, did submit their grievances to the Union as provided in the collective bargaining agreement. It was heretofore noted that the jury found that the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement as to each of the plaintiffs. It is the claim of the defendant Union that evidence is lacking that the plaintiffs made known to the defendant Union that it was their claim that their employment had been terminated in violation of that agreement. Each of the plaintiffs no-

tified Miss Acevedo, the defendant Union's designated representative, as to her dissatisfaction with the termination of her employment. Miss Acevedo, as heretofore noted, was an employee in the same department as the plaintiffs. That department was not a very large department, and Miss Acevedo would undoubtedly have had personal acquaintance with all of the members that department and their periods of service. She undoubtedly would have known that switchboard operators were being retained who were junior in service to the plaintiffs. All of the plaintiffs and all those with lesser seniority retained by the defendant Telephone Company were members of the Union. They all had the same ethnic background. The only possible ground of complaint of the plaintiffs would have to be based upon the violation of the seniority provision, and it would seem improbable that Miss Acevedo did not understand that the plaintiffs were complaining that their employment was being terminated in violation of the seniority provision of the collective bargaining agreement.

It is the view and holding of the Court that the claim of the defendant Union as to the insufficiency of the evidence is not well founded.

In connection with the matter of damages, the jury was instructed as follows:

"Instruction No. 8

"You will make a determination as to the loss of earnings of each plaintiff from the time of her layoff up to February 29, 1968.

"That loss in the case of a particular plaintiff would be the difference between what she has earned since her layoff up to February 29, 1968, and what she would have earned during that period had she been continued in the employment of the Company. Amounts paid by an employer for medical benefit protection for and in

behalf of an employee are to be included in the earnings of such employee. Amounts received by an employee during maternity leave are includable in her earnings. You need not give consideration to the matter of unemployment compensation, vacation allowance or sick leave.

"It was the duty of each plaintiff after her layoff to use reasonable diligence and reasonable means to secure employment she could reasonably be expected to perform in order to diminish her loss of earnings occasioned by her layoff. Any loss of earnings attributable to her failure to so do should not be included by you in fixing the amount of her loss of earnings.

"The burden is upon each plaintiff to establish by a preponderance of the evidence the proper amount of her loss of earnings."

The jury was further instructed as follows in connection with the matter of damages:

"Instruction No. 10

"If you find that the Union acted arbitrarily, discriminatorily or in bad faith in connection with the grievance of any plaintiff, you will give consideration to the matter of the responsibility, if any, of the Union for a proportionate share of her damages.

"The layoff of the plaintiffs was the action and the responsibility of the Company. It was not the action of the Union and it did not have nor does not have any responsibility for such layoff. The resonsibility of the Union did not commence until after that action by the Company. It was the Union's responsibility to deal with the grievance of each plaintiff as to her being laid off in violation of the seniority provision of the collective bargaining agreement nonarbitrarily, nondiscriminatorily and in good faith.

"The proportion of the total loss of earnings sustained by each plaintiff because the Union acted arbitrarily, discriminatorily or in bad faith in connection

with her grievance would be that proportion which would represent the increase of her loss of earnings because of such conduct.

"You will determine on a percentage basis what proportion of the loss of earnings of each plaintiff would properly be attributable to the Union's wrongful conduct. You are instructed that the percentage could vary in each case."

The jury, after determining the entire loss of earnings of each plaintiff due to the termination of her employment, determined that in the case of six of the plaintiffs the defendant Unions were liable for 40 percent thereof. In the case of the plaintiff Elsie Lugo Bernier, the jury determined that the defendant Telephone Company was liable for 100 percent thereof.

Jurisdiction in this case is based upon the provisions of the Labor Management Relations Act of 1947, 29 U. S. C. A. Sec. 141 et seq. It is the claim of the defendants that they are not liable to the plaintiffs under the applicable law.

In the present case the plaintiffs assert liability against the defendant Telephone Company based upon the violation of the seniority provision of the collective bargaining agreement between the defendant Union of which they were members and the defendant Telephone Company. The leading case on the right of a member of a union to maintain an action against his or her employer and the union of which he or she is a member, based upon a collective bargaining agreement between his or her employer and his or her union, is the case Vaca v. Sipes (1967), 368 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842. In that case the situation was that a member of a union had been discharged by his employer, Swift & Company. The member claimed that his discharge was in violation of the collective bargaining agreement between his employer and his union. He sought to recover damages from his union for allegedly having

"arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift & Company to arbitration under the fifth step of the bargaining agreement's grievance procedures. An action in state court was instituted. Upon review of that proceeding, the United States Supreme Court stated some of the rules applicable in actions similar to the present action. In that case the Court held that before a discharged employee may proceed to the courts for relief he must establish that he has exhausted the grievance procedures provided in the collective bargaining agreement, so far as he is able to do. In that case the Court stated that where the discharge is wrongful it is the employer that has committed a breach of the collective bargaining agreement and that the only responsibility of the union is in connection with the handling of the employee's grievance in connection with the alleged wrongful discharge. In that case the Court stated 386 U. S. p. 187, S. Ct. p. 915:

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the *union's breach of duty will have enhanced or contributed to the employee's injury.* What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer. Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a *single* injury. * * *" (emphasis supplied).

In the present case it was the jury determination that the defendant Telephone Company discharged each of the plaintiffs in violation of the seniority provision in the collective bargaining agreement. It was also the jury deter-

mination, except in the case of the plaintiff Elsie Lugo Bernier, that the defendant Union was at fault in failing to submit her grievance for such wrongful discharge with the defendant Telephone Company as provided for and required by the collective bargaining agreement. In the case of each of the plaintiffs, except in the case of Elsie Lugo Bernier, it was the jury determination that the damages from the original injury were thereby enhanced 40 percent. In the case of the plaintiff Elsie Lugo Bernier, it was the jury determination that the defendant Union had exhausted in her behalf the grievance procedures provided for and required by the collective bargaining agreement and that all of her damages were properly chargeable to the defendant Telephone Company.

It is the ruling of the Court that the judgments rendered in this case against the defendants were in accord with the law as established by Vaca v. Sipes, *supra*.

It is the claim of the defendants that the claims of the plaintiffs are barred by the statute of limitations. The case of International Union, United Auto etc. v. Hoosier Cardinal Corporation (1966), 383 U. S. 696, 86 S. Ct. 1107, 16 L. Ed. 192, is of importance as to the matter of the statute of limitations. In that case the plaintiff union and the defendant, Hoosier Cardinal Corporation, were parties to a collective bargaining agreement. The location of the employment was in Indiana. The employer discharged a number of employees. The union claimed that the discharged employees were entitled to accumulated vacation pay which had not been paid them. Four years later the union brought an action in behalf of the discharged employees for such pay. The employer asserted that the claims asserted were barred by the statute of limitations. The United States Supreme Court held that there was no federal statute of limitations applicable to actions based upon a collective bargaining agreement. That Court further

held that the appropriate state statute of limitations was applicable. In the present case the applicable statute of limitations is that of the Commonwealth of Puerto Rico. In the case of Auto Workers v. Hoosier Cardinal Corporation, *supra*, the District Court regarded the action as based partially upon the written collective bargaining agreement and partially upon the oral employment contract each employee had made. It held that Indiana would apply to such an action its six-year statute govering contracts not in writing. The Supreme Court accepted that interpretation.

It was heretofore noted that the employment of five of the plaintiffs was terminated on April 3, 1964; that the employment of one plaintiff was terminated on April 8, 1964; and that the employment of another plaintiff was terminated on September 19, 1963. The complaint in the present action was filed on November 22, 1965. It is the claim of the defendant Unions that the claims of the plaintiffs are barred by the one-year statute of limitations fixed for actions based on fault or negligence by Article 1868 of the Civil Code of Puerto Rico, 31 L. P. R. A. Section 5298. The defendant Telephone Company makes the same claim. It is also the claim of the defendant Telephone Company that the claims of the plaintiffs are barred by the provision of Section 160(b), Title 29 U. S. C. A., which requires that complaints as to unfair labor practices be made within six months after their occurrence.

It would seem that the clear interpretation of the holding in the case of Auto Workers v. Hoosier Cardinal Corporation, *supra*, is that it is the local statute of limitations rather than the provision of Section 160(b), Title 29 U. S. C. A., which governs the time for the bringing of court actions for breach of a collective bargaining agreement. It seems clear that if the present action is to be characterized as an action for breach of contract, it would not fall within

the scope of Article 1868 of the Civil Code of Puerto Rico relied on by the defendants.

It is the view of the Court that the basic character of the claim of each of the plaintiffs is that of an action based upon the breach of contract, that breach being a breach of the seniority provision of the collective bargaining agreement. Each plaintiff seeks to recover her loss of wages based upon that breach. Each seeks to recover from the defendant Unions the enhancement of her loss by them. The defendant Unions, in substance, claim that the claim of each plaintiff consists of two causes of action, one against the defendant Telephone Company and another against the defendant Unions.

The opinion in the case of Vaca v. Sipes, *supra*, refers to the action of the employee against his employer and his union as being an action for a "single injury". (386 U. S. 187, 87 S. Ct. 903). In that same case the Court points out (386 U. S. p. 187, 87 S. Ct. 903) that it is the employer who breached the contract and that the union's responsibility has to do with the enhancement of the damages sustained by the employee.

In the case Fischer v. Brotherhood of Railroad Trainmen (D. C. Mo. 1968), 284 F. Supp. 491, a railroad employee brought an action in state court against his employer and his union because of his discharge. The action was removed to federal court. If the claims against the employer and the union were separate and independent claims or causes of action, the case was properly removed. The Court held that the case was not removable. The Court, after referring to a number of authorities, stated (p. 493):

> "In light of these authorities, we do not believe it can fairly be said that plaintiff's action against the two parties can be said to present separate and independ-

ent claims or causes of action but that plaintiff seeks to recover for a single wrong in which damage must be apportioned between the defendants * * *."

It is the view of the Court that in the present case each of the plaintiffs made one basic claim and that was that the defendant Telephone Company had breached its contract of employment by a violation of the seniority clause, the damages for which breach were enhanced by the conduct of the defendant Unions.

It is the holding of the Court that the claims of the plaintiffs are not barred by the statute of limitations.

Five of the plaintiffs during the period they were unemployed received unemployment compensation under the provisions of the Puerto Rico Employment Security Act, Title 29, L. P. R. A., Sections 701-717. Those plaintiff's and the amounts received by them are as follows:

Name	Amount
Rosa M. Figueroa de Arroyo	$208.00
Andrea Colon Tubens	208.00
Iris Trabal Quintana	416.00
Luz Arminda Toro Tirado	208.00
Elsie Torres Ramos	416.00

In the judgment entered in this action the Court directed that the amounts of those payments be deducted from the amounts fixed by the jury as damages. In their post-trial motions those plaintiffs move that the judgment be amended to eliminate such deductions. It appears from the authorities that those plaintiff's are entitled to such elimination. Magelssen v. Local Union No. 518, Operative Plasterers, etc. (D. C. 1965), 240 F. Supp 259, 263; Pennington v. Whiting Tubular Products, Inc. (1963), 370 Mich. 590, 122 N. W. 2d 692.

IT IS HEREBY ORDERED that the judgment heretofore entered herein be amended to eliminate the provision con-

tained therein deducting the amount of the unemployment compensation payments from the amount of damages recoverable by those plaintiffs.

It is FURTHER ORDERED that the judgment in favor of those plaintiffs against the defendants be increased accordingly.

The parties made a number of contentions other than those referred to. The Court has considered them. It is of the view that not any of them are well founded.

It is FURTHER ORDERED that, save as to the amending of the judgment in regard to the matter of unemployment compensation payments, all of the post-trial motions of the parties be and they are hereby in all respects overruled and denied.

APPENDIX C.

STATUTES INVOLVED.

Section 203(d), 29 U. S. C., § 173(d), of the National Labor Relations Act, as amended:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

Section 301(a), 29 U.S.C. § 185(a), of the National Labor Relations Act, as amended:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 10(b), 29 U. S. C. § 160(b), of the National Labor Relations Act, as amended:

> ". . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by

reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge."

Also involved are three Puerto Rican statutes, 31 LPRA § 5141:

"A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done."

31 LPRA § 5298:

"The following prescribe in one year:

"2. Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence mentioned in section 5141 of this title, from the time the aggrieved person had knowledge thereof."

31 LPRA § 5294:

"A mortgage action prescribes after twenty years, and those which are personal and for which no special term of prescription is fixed, after fifteen years."

APPENDIX D.

Puerto Rico Telephone Company *and* Sindicato de Trabajadores Packinghouse, United Packinghouse Food & Allied Workers, District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963. *Case No. 24-CA-1739. November 20, 1964.*

DECISION AND ORDER.

On February 3, 1964, Trial Examiner Samuel M. Singer issued his Decision in the above-entitled case finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the

exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that Respondent, Puerto Rico Telephone Company, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following addition:

Add the following as paragraph 2(d) in the Trial Examiner's Recommended Order, and reletter the subsequent paragraphs thereof accordingly:

"Notify the employees entitled to reinstatement if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

1. As the record and brief adequately present the issues and the positions of the parties, Respondent's request for oral argument is hereby denied.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

Upon a charge filed on March 8, 1963, and amended charges filed March 20 and August 15, 1963, by the above-named labor organizations, herein collectively called the Union, the General Counsel issued a complaint on August 15, 1963, against Puerto Rico Telephone Company, herein called the Respondent or the Company. The complaint alleged that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally contracting out certain work performed by employees in the bargaining unit rep-

resented by the Union, as a result of which Respondent had laid off employees in the unit, without giving the Union prior notice and opportunity to negotiate concerning the same. The complaint further alleged that Respondent, in violation of the same section, refused to furnish to the Union, upon its request, certain information to enable it to process a grievance arising out of the layoff of employees in the unit.

Pursuant to notice, a hearing was held before Trial Examiner Samuel M. Singer in Santurce, Puerto Rico, on various dates between October 7 and November 6, 1963. All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Briefs have been received from General Counsel and Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings and Conclusions.

I. The Business of Respondent.

Respondent, a Delaware corporation, is authorized to do business in the Commonwealth of Puerto Rico, and has been, and is, engaged in furnishing telephonic communication throughout the Commonwealth of Puerto Rico and between Puerto Rico and points outside thereof. In the course of its operations, Respondent annually imports materials and equipment which are shipped directly to it from points outside of Puerto Rico and which are valued in excess of $50,000, and its annual gross volume of business exceeds $500,000. Respondent admits, and I find, that at all times material herein Respondent has been, and is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved.

The Charging Parties are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. *Contractual relations between Respondent and the Union.*[1]

Respondent and the Union have had contractual relations since May 7, 1959, when the parties entered into their first collective-

1. The findings in this and succeeding sections are for the most part based on undisputed testimony and documentary evidence. When witnesses gave differing versions of events, I resolved the conflicts on the basis of the comparative demeanor of the witnesses and on the basis of what appeared to me, considering the whole record, to be more consistent with the inherent probabilities of the situation.

bargaining agreement, effective from that date through May 6, 1962. Article II of that agreement included in the bargaining unit all employees of the Company in Puerto Rico with the exception of part-time and temporary employees and certain other employees such as executives, supervisors, secretaries, etc. The contract also contained a management-prerogative clause and other clauses frequently found in labor contracts, such as a no-strike and no-lockout clause and provisions dealing with seniority, grievance procedure, etc. There was no clause specifically covering subcontracting.

As related in greater detail below, in October 1961 the parties commenced to negotiate a new contract to replace their 1959 agreement. As also appears below, Respondent had by then been involved in an extensive expansion program to enlarge and improve its telephone services, employing various contractors to perform this work. Anxious to protect itself from possible adverse effects of subcontracting by the Company, the Union's bargaining demands included limitation of Respondent's right to subcontract. Negotiations were suspended in early 1962 while the Regional Director processed an election petition of a rival union. Following an election, the Regional Director on July 5, 1962, certified the Union[2] as bargaining representative of an appropriate unit consisting of substantially the same employees as were covered in the 1959 contract, specifically excluding from the unit Respondent's temporary and part-time employees.[3] Thereafter on July 24, 1962,

2. The certification ran to the Sindicato or International. On August 21, 1962, the certification was amended to include the Sindicato's affiliate, Local 963, as joint bargaining representative. As already noted, the Sindicato and the Local are herein collectively referred to as the Union.

3. The unit description reads: "All nonsupervisory employees of the Employer including all regular employees, probationary employees, messengers and mail clerks but excluding all executives, company officers, department heads, division heads, zone supervisors, section heads, district and geographical sub-division heads; foremen; secretaries to company officers, executives and department heads; all employees of Industrial Relations Department except messengers and mail clerks; directory salesmen; commission salesmen; all professional and technical employees; all guards; and supervisors as defined in the Act."

Temporary and part-time employees were excluded from the unit by footnote 3 of the Decision and Direction of Election dated April 19, 1962, wherein the Regional Director noted that the "Employer has been engaged in a 5-year construction program for the expansion of its telephone system . . . since about January 1960, and temporary and part-time employees are hired only for special projects in connection with this program"; and that these employees have "no substantial expectancy of continued employment."

the parties resumed contract negotiations, and after some 30 sessions, a new agreement was signed on November 8, 1962, effective October 28, 1962, to October 27, 1964. This contract contained a management clause like that in the 1959 contract and also similar no-strike and no-lockout, seniority, and grievance provisions. The new contract, like the 1959 contract, was silent on subcontracting. Attached to the contract was a schedule of job classifications in the bargaining unit, including telephone installers, repairmen, linemen, switchmen, framemen, splicers, testmen, telephone operators, clerks, etc.

B. *Respondent's expansion program and subcontracting arrangements.*

Respondent undertook its expansion program at the end of 1958 under the direction of the Public Service Commission of Puerto Rico. Originally envisaging expenditure of $52 million, over a 5-year period, the program was enlarged in 1961 to $130 million, with completion in 3 years. Actual construction thereunder began in 1960, reaching peak in mid-1962, when it began tapering off. Generally, the program included conversions of stations from manual to automatic installations, expansion of existing central offices, enlargement and modernization of long-distance circuits, and installation and addition of cables.

Gerard Lavergne, vice president and chief engineer of Respondent, testified that as a result of the construction program there was an increase from about 70,000 stations at the end of 1959 to slightly over 150,000 in August 1963. (He defined a "station" as a telephone instrument, including an extension of a telephone in a home, and a telephone connected to a private PBX or PABX switchboard in a hotel.) Thomas B. Neff, Respondent's executive vice president, estimated that the Company increased the number of its telephones in service in 1962 by an "unparalleled 35%," having installed some 14,000 telephones in the first half and 20,000 telephones in the last half of that year. Neff stated, "We have used subcontracting for very basic reasons; we have had to double the size of the Puerto Rico Telephone Company in less than five years. We couldn't possibly have done it without a substantial amount of subcontracting. We have grown far faster than any other telephone company has ever attempted in the United States or in any other part of the world for that matter."

Neff further explained that because of the "tremendous number of new [telephone] installations" facing the Company in the last half of 1962 and the "tremendous backlog of transfers and removals," the Company could not perform all of the work with its own work force, and "so we subcontracted part of the work."[4]

4. The Company had let contracts in 1960 and 1961, as well as 1962. Neff testified that the Company awarded contracts each

It is undisputed that the subcontractors had employed workers with job classifications falling within the appropriate unit, including telephone installers, repairmen, linemen, framemen, splicers, and testers. (Some work, such as digging trenches, obviously entailed work not performed by employees in the unit.) Respondent's own work force, including installers, handled removals and transfers of existing telephones[5] in areas operated by subcontractors, while the subcontractors' men "concentrated" on "new" installations in these same areas. Respondent's plant director selected work areas for the contractor's workmen, and its dispatcher dispatched them in the same way they had for the Company's own employees.

The record contains a list of 41 subcontracts on which work was performed by various contractors during the period covered by the complaint (November 9, 1962 to March 31, 1963).[6] Six of these contracts received in evidence dealt with installation and cable distribution, both involving tasks performed by unit personnel.[7] Respondent conceded at the hearing that "the Company did not give notice [to the Union] prior to any specific one of the numerous contracts of various nature that the Company had entered into."

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month from January 1962 to September 1963. One of Respondent's major contractors was I. T. T. Puerto Rico, Inc., wholly owned by I. T. T. Caribbean Manufacturing, Inc., which in turn is wholly owned by International Telephone and Telegraph Corporation whose headquarters are in New York City. The latter also owns about 80 percent of the stock of Respondent. I. T. T. Puerto Rico, Inc., commenced business in Puerto Rico at the end of 1961 or beginning of 1962.

5. Neff described these as "the miscellaneous and more difficult jobs." Neff further stated that the Company's force also handled "small" ($1,000 to $5,000) construction jobs not desirable to subcontract, provided the Company had on hand an adequate supply of skilled and technical help.

6. The contracts in question were produced by the Company in the course of the hearing only after it was directed to do so by order of the U. S. District Court for the District of Puerto Rico in proceedings to enforce the Board's *subpoena duces tecum*. After the issuance of the court's order, Respondent's counsel fully cooperated in the production of relevant material.

7. A seventh contract produced by General Counsel covered a "special test job" by the subcontractor's employees, which, as Vice President Neff testified, did not involve work performed by Respondent's regular employees.

C. *The negotiations concerning subcontracting preceding the execution of the November 8, 1962, contract.*

As already noted in section A, *supra*, Respondent's subcontracting was a subject of concern to the Union during the negotiation of the 1962 contract. Amando Sanchez the International's president, testified at the hearing that although the Company had subcontracted work during the term of the 1959 contract (which expired on May 6, 1962), the subcontracting at that time "did not cause discharges, but it caused the Union to put itself on its guard because of the continuation of same could adversely affect the interests of the employees."[8] Accordingly, at the very start of the negotiations in October 1961, the Union proposed a clause restricting the Company's right to subcontract and the Union continued to press therefor until suspension of negotiations early in 1962 due to pendency of representation proceedings initiated by a rival union (section A, *supra*). In response to the Union's request as to "what security was going to be given the employees," the Company assured the Union that the contracts would not affect the employees in the unit,[9] and, indeed, that there would be an increase rather than a decrease, in unit personnel. On June 8, 1962, during pendency of the representation proceedings, the Union wrote Respondent:

> The Company has been violating the current contract by the manner in which the Company has been giving its contracts to companies other than the telephone company, which is directly harming the employees of the Telephone Company, which is stipulated in said current contract between the Union and the Company saying that in the event that the Company should need to carry out "special jobs" the same shall be

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8. As noted under section B, *supra*, the peak of Respondent's expansion program occurred in 1962.

9. This finding is based upon the testimony of Sanchez which is corroborated by other General Counsel's witnesses. His testimony also jibes with the Company's position in this proceeding that the subcontracts did not adversely affect the unit employees. Sanchez and other General Counsel witnesses further testified that during this and later periods in the negotiations the Company's representatives also assured the Union that there would be no further subcontracting after expiration of the existing contracts and conversion of the installation in Arecibo, which took place on November 30, 1962—a statement vigorously denied by the Company's representatives. I credit this denial by the Company's representatives. It seems unlikely that such a statement would have been made by the Company's representatives at a time when the Company's expansion program was in full momentum.

performed by temporary employees or otherwise an agreement would be reached in advance between the Union and the Company.[10]

In its reply of July 19, 1962, the Company stated:

> We are not in agreement that the Company has been violating any contract (the last collective-bargaining agreement expired on May 6, 1962) by contracting work with other companies. The Company expressly reserves at all times the right to subcontract whenever it may deem it pertinent. In normal times, the Company would be the last to go out to contract work outside because of the high cost of same. At the present time and due to the enormous expansion program we have been forced to resort to private contractors.

When negotiations resumed on July 24, 1962, the Union resubmitted its original subcontracting proposal.[11] This proposal was the subject of major discussion at a meeting between the parties on September 15, 1962, when Respondent rejected it on the ground that it established a closed shop. The Union then proposed the following substitute subcontracting clause:

> The Company is carrying out an expansion program pursuant to an order of the Public Service Commission for which program some work is being performed by subcontracts, a large part of which is in its final stage. The Company guarantees the Union that it is not its intent to subcontract regular production and maintenance jobs that are performed by members of the Union. Likewise the Company gives assurance that should some work have to be performed in addition to that ordinarily performed by production and maintenance workers pursuant to the expansion program, and the Company for that reason would have to subcontract said work, such will not affect the condition of employment of those regular workers who, were it not for the exigencies of the expansion program, might perform the subcontracted work.

At the next meeting, September 18, 1962, the parties discussed this substitute proposal. It was at this meeting or the preceding

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10. The reference appears to be to article 11, section 2 of the 1959 contract.

11. The clause in question read: "When the COMPANY should need to perform any work by contract, it commits itself to make efforts with the contractor so that preference be given for employment to the regular employees of the employer who are members of the UNION, who may be available for work. Before work is commenced by the contractor the employer shall notify the UNION and make arrangements so that before the work of the contractor commences a meeting be held between the UNION, the COMPANY and the contractor to see how much personnel the UNION can supply."

one on September 15 that two employee members of the Union Committee protested that unit employees at certain locations were being adversely affected by subcontracts pertaining to installation of new telephones, and the Company's representatives promised to look into the matter. In support of the Union's position, Luis G. Estades, counsel for the International, called attention, at the September 18 meeting, to the Board's *Town & Country* and *Fibreboard* decisions and the Supreme Court's *United Steelworkers* cases.[12] Rafael Orellana, a company representative, replied that he was familiar with the principles enunciated in these cases and would consult with the Company's attorneys.[13] Orellana then requested that the subject of subcontracting be deferred and discussed at a later time along with the noneconomic clauses pending at that time.[14]

Sometime thereafter the Insular (Puerto Rico) Conciliation Service was called in to assist the parties in the negotiations, particularly in resolving the economic issues separating the parties. After reaching agreement on the economic issues, there still remained unresolved at the final bargaining session on October 24 and 25, 1962, eight noneconomic or "administrative" issues. These involved no-strike and no-lockout, union shop, checkoff, union recognition, entire agreement, subcontracting, union responsibility, and management-rights provisions. The parties ultimately reached agreement on all matters except the union-responsibility clause

12. As noted *infra*, in *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022 (subsequently enfd. 316 F. 2d 846 (C. A. 5)), and *Fibreboard Paper Products Corporation*, 138 NLRB 550 (subsequently enfd. *sub nom. East Bay Machinists, Local 1304, et al.*, 322 F. 2d 411 (C. A. D. C.)), the Board held that an employer's decision to subcontract work performed by members of an existing bargaining unit, even though based on economic considerations, is a subject of mandatory bargaining. In *United Steelworkers v. Gulf Navigation Co.*, 363 U. S. 574, the Supreme Court held an arbitrator was empowered to determine whether a subcontracting controversy was arbitrable, even though the bargaining contract contained no express provision on subcontracting and the contract withheld from the grivance procedure "matters which are strictly a function of management."

13. Orellana, at that time the Company's director of labor relations, and Luis Gonzalez Monclova, the Company's director of industrial relations, were Respondent's chief negotiators. (Orellana became director of industrial relations on March 25, 1963, and Gonzalez Monclova sometime after that date became administrative assistant to the Company's president.) The Union was represented at the negotiations by Armando Sanchez, its chief spokesman; and a committee composed of local officers and Company employees.

14. The foregoing finding as to the September 18 meeting is based on the uncontradicted credible testimony of Estades.

which the Union rejected[15] and the subcontracting clause (heretofore referred to) which the Company rejected. Thereafter the Company withdrew the union-security clause and a draft was agreed upon excluding this clause and also the subcontracting clause. The Union's membership ratified the agreement at a meeting held on October 28 and the parties then executed the new contract on November 8, 1962.

D. *The Layoffs.*

1. Nature and scope of the layoffs.

The record establishes, and I find, that Respondent permanently laid off 227 unit employees during the complaint period, November 9, 1962, to March 31, 1963.[16] These layoffs took place on November 9, 16, 23, 30 (or December 1), 1962, and March 8 and 29, 1963. Included among the laid-off employees were "station" installers, repairmen, framemen, linemen, splicers, switchmen, testmen, etc. According to Industrial Relations (formerly Labor Relations) Director Orellana, the particular employees affected first learned of their layoff on arrival at the plant, without advance notice of any kind, being handed a letter stating that their layoff was due to Company "reorganization."

Company Vice President Neff vigorously denied in his testimony that the Company's subcontracting operations had contributed to the layoff of so much as "a single person" in the unit.[17] Indeed,

15. Under that clause the Union was to undertake to see that all members comply with the provisions of the contract, to oppose absences and other practices that may affect company operations, and to support the Company's effort to eliminate waste and inefficiency and improve the quality of the work.

16. This finding is based on General Counsel's Exhibit No. 12, a document furnished to General Counsel by Respondent. (The document inadvertently lists the initial date as November 9, 1963, instead of November 9, 1962.) Although General Counsel's brief refers to 205 (instead of 227) employees, this does not include the 22 "probationary" employees, listed in General Counsel's Exhibit No. 12, who are also included in the appropriate unit. At one point, Respondent stipulated that it had laid off 170 unit employees between November 9 and March 8, the last date mentioned in the original complaint. The complaint was thereafter amended to extend the complaint period to March 31, 1963. General Counsel's Exhibit No. 12 lists additional employees laid off during the period in question, but these include nonunit employees such as supervisors, temporary and part-timers, etc.

17. For the reasons hereafter stated, I do not credit Neff's conclusionary statements regarding the impact of the subcontracting upon the bargaining unit.

Neff contended that the Company's force of telephone installers was "augmented" during the period in question to take care of peak loads. Neff testified that the layoffs resulted not from subcontracting, but from a "manpower study," which he made, showing Respondent to have been operating inefficiently as compared to other telephone companies; and that the Company could reduce its costs by eliminating the "least efficient" employees. Neff concluded that the Company should embark upon a program of reducing the Company's work force on a gradual basis, department by department and month by month, until a desirable level was reached by the end of 1963.[18] Company President Benckert testified that he knew of no utility that was as "horribly overstaffed" as Respondent and stated that both "the layoffs and the size of the work force was unprecedented." Benckert conceded that the layoff employees included men with considerable experience, and Neff explained that they included splicers who are highly trained and valuable employees but who in this case were "less efficient" than those retained.

It is clear from the record, and I find, that whereas prior to the letting of the contracts Respondent's employees worked on new installations ("i.e., installing telephones for new subscribers) in all areas of the Company's operations, as well as "miscellaneous" installations, (transfers, removals, changing line cords and colors of telephones), such new installations were thereafter made also exclusively by employees of subcontractors in the particular areas in which they operated. Neff so testified.[19] In addition, Julio A. Ramos, employed by Respondent as a service order supervisor during the period here involved, credibly testified that his superior had instructed him to route orders for new installations to a subcontractor's office. Severo Figueroa, an installer for Respondent, credibly testified that just before a particular subcontractor commenced operations in his area, the Company's installers were informed by a supervisor that all new installations would thereafter be handled by the subcontractor while the Company's installers would be restricted to "miscellaneous" work.[20]

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18. Illustrating the effect of the cost reduction program, Neff stated that at the end of March 1942 Respondent had 24.97 people per thousand stations as compared to Bell System's 8.5 and General Telephone's 7.9. He indicated the Company's present ratio to be 14 people per thousand stations. Neff admitted that increased stations installed by employees of Respondent's subcontractors had contributed to the present improved picture.

19. Neff also testified that since the latter part of 1962 the Company has returned instruments to the factory for repairs, rather than performing such repairs through its telephone shop mechanics, but that he did not know that this was done by subcontract. One of the installation contracts in evidence provides for repairs by the contractor.

20. Ramos' and Figueroa's testimony on these matters was uncontradicted.

2. The November 1962 grievance discussions.

As already noted, Respondent's layoffs commenced on November 9, 1962, the day after execution of the new collective-bargaining agreement. It is clear from the record, and I find, that Respondent did not give the Union any advance notice regarding the November 9 layoff.[21]

The Union promptly filed strenuous protests against Respondent's action. On November 13, 1962, the Union formally complained to the Company that during the negotiations it had "consistently demanded the elimination of the work contracts entered into by the Company in its expansion program"; that the Union had expressed itself both prior and during the negotiations about the possible "threats to employment" resulting from these contracts; that there were Labor Board decisions requiring these matters to be negotiated; that as a result of the Company's reorganization program employee jobs had already been eliminated; that the continuation of these contracts "creates a grave situation" and union members should be permitted to work on these contracts for the contractors; and that the subcontracting as practiced by the Company be eliminated in compliance with legal requirements. In another letter, written the same date (November 13) the Union pointed out that the first layoffs came only 1 day after the new contract was signed and involved employees with 25 years' service; that "it appears that these discharges have been effected in full violation of the terms of the collective-bargaining agreement"; that since the Union had not been given the names and there was a 3-day limitation for filing grievances under the contract, the Union was now filing a broad general complaint against all future layoffs; and that it was requesting a meeting of the Grievance Committee to consider "each and every one of the cases" involved.

The parties thereafter held a "formal" grievance session on November 15 and two "informal" sessions on November 19 and 27 at which they discussed the layoffs.[22] There is a conflict of testimony as to what transpired at these meetings; in particular, as to whether Orellana (as he and other Company witnesses testified)

21. Orellana, the Company's then labor relations director, admitted he did not have "any recollection of having advised them [the Union] of the first layoffs." Pressed further, he admitted having testified before the Puerto Rico Senate Labor Committee on a prior occasion that he had no knowledge at the time of signing the contract that this layoff was scheduled for the next day.

22. Frank Dalmau, an official of the Company and one of its representatives along with Orellana and Gonzales Monclova on the grievance committee, characterized as "formal" a meeting in which official minutes were taken. If no agreement was reached at the first formal meeting, discussions continued at ensuing "informal" sessions.

had at these meetings given the Union advance notice of layoffs that followed on November 16, 23, and 30 (or December 1), 1962.[23] The minutes of the November 15 meeting (the only one for which minutes were taken) make no reference to such notice. These minutes do show that the Union had claimed, and the Company denied, that the layoffs were in violation of the seniority clause of the contract; that Gonzalez Monclova, speaking for the Company, explained that the separations were due to the "construction program" which, after reaching "its peak," was now entering into "sort of a plateau" or descending line, leaving an excess of personnel. When the Union noted that the Company during the negotiations had indicated that it would have a work force of 2,000, Orellana explained that many of the employees were not in the unit and that the separations "could not affect the figure mentioned."

There is evidence in the record, and I find, that as a result of the discussions in November the Company reinstated several employees who were originally laid off.[24]

3. The February 1963 discussions

The parties met again on February 6 and 12, 1963, to discuss subcontracting with Attorney Estades and Attorney Ruiz-Suria as chief spokesmen for the Union and Respondent respectively. After discussion of Board decisions the parties felt that they had arrived at an agreement and it was agreed that Orellana should reduce the agreement to writing. Orellana thereafter did draft and sign a document incorporating the positions of the parties on subcontracting and the alleged agreement. On advice from Estades, the Union declined to sign the "agreement" on the ground that it allegedly failed to cover all agreed points.[25]

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23. Orellana testified that at the November 15 meeting he orally advised the Union of the layoff the next day and that later he similarly apprised the Union of the November 23 and 30 layoffs in advance—all "out of courtesy" rather than out of a sense of obligation. Respondent called Dalmau and Renier Mendez (another company official) to corroborate Orellana's testimony respecting the notices given on two of the three layoffs (November 16 and 30). General Counsel's witnesses, including Sanchez, denied receiving the notices and claimed that they had learned about the layoffs directly from the affected employees. For reasons hereafter noted, I do not find it necessary to resolve this testimonial conflict.

24. Sanchez indicated that six or seven employees were reinstated but that these were later laid off once more. Orellana, placing the figure at nine, did not deny Sanchez' testimony regarding their subsequent second layoff.

25. According to the document (received in evidence), Orellana, in reciting the Company's position on subcontracting, stated that

4. The March 1963 grievance discussions; the Company's refusal to comply with the Union's request for economic data to support its position and to submit the dispute to conciliation and arbitration.

The subjects of subcontracting and layoffs again occupied the parties' attention in March. On March 5 and 6, 1963, Industrial Relations Director Orellana informed the Union that there would be another layoff on March 8.[26] Orellana did not identify the employees involved or their job classifications, mentioning only a "round figure" and indicating that the "decision" to lay off had been made by management.[27] By telegram dated March 7 the Union demanded that Respondent stop the layoffs and urged it to negotiate the "conditions for retirement" if layoffs became necessary.[28] The parties thereafter held several meetings, commencing March 9, 1963, in which they discussed the layoffs and whether they were the result of the Company's subcontracting (as claimed by

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while the Company maintained that it had the right to subcontract, it "recognizes that it should notify the Union in advance of its decision to subcontract" so that the Union "may raise the issues that it may deem necessary and negotiate" regarding the effect of the subcontracting on the employees. The Company undertook the "obligation to notify the Union before subcontracting of its decision to do so," in order to afford the Union an opportunity to discuss "the effect" of the decision upon unit employees and to submit proposed countermeasures. The Company reserved, however, the power of ultimate decision. The Union refused to sign the document because it claimed that the Company had also agreed to discuss the impact of the existing subcontracts on the unit employees and the remedies to be taken to compensate the laid-off employees.

26. The foregoing finding is based upon the testimony of Orellana which in this instance I credit. The testimony of union representatives that they did not receive notice of the forthcoming layoff on this particular occasion is equivocal and unconvincing.

27. Orellana testified that although he was the director of the labor relations department during the layoffs in November and March, he did not know the identity of the employees selected for layoff and that the industrial relations department, which informed him of the approximate number involved, did not know their identity either. He further testified that he never informed or discussed with the Union any anticipated company decision to lay off employees, prior to definitive company decision thereon.

28. Meanwhile by letter dated March 6, 1963, the Union requested (and on March 20 the Company furnished) a list containing the names, classifications, dates of employment, and status of the employees in the bargaining unit. The Union stated that it needed the information to assist it in "finding a solution" to the layoff problem.

the Union) or of "economic reorganization" (as claimed by Respondent). At their March 12 meeting, the parties agreed to submit the layoff dispute to the grievance committee established by their existing collective agreement. The committee thereafter met on three occasions with Orellana (or Gonzalez Monclova) as the Company's chief spokesman and Ramon Rohena Garay, an official of the International, as the Union's spokesman.[29]

At the March 14 grievance committee meeting Rohena asked the Company to submit data relating to the subcontracts and to "prove" to the committee that the layoffs were due to "economic reorganization." Orellana replied that "the company has the right to subcontract at any time and also . . . to lay off according to the contract." He rejected the Union's demand to submit evidence "to prove the economic reasons" for the layoffs. The parties took the same position at the ensuing grievance committee meetings held on March 15 and 18. The specific information which the Union requested in the course of the discussions included:

1. Volume of business during the months of January, February and March 1963 compared with November 1962 when the contract was signed.
2. Earnings derived by the company from its volume of business.
3. Amounts saved by the Company on account of wages of those laid off.
4. Is someone performing the labor that the laid off personnel performed?
5. How much will the company save?[30]

29. Article XV of the labor contract spells out the procedure for adjustment of a grievance; defined "as the allegation made by one or more employees of a violation or violations of the contractual provisions established in this Agreement." Successive steps are provided for processing the grievance through company officials, but these are dispensed with where the grievance involves suspension or layoff. In the latter case, the Union initiates grievance discussions with the Company's director of industrial relations. The contract provides that thereafter the "Company shall have the right to summon the Grievance Committee," which consists of two representatives of the Company and the Union, "to settle the grievance." Section 4(c) provides that "If this committee should fail to agree, it shall appeal to the conciliation service to help the parties in coming to an agreement, save in cases where the parties decide not to use said service. Should the parties fail to come to an agreement even thus, it shall by majority vote appoint a fifth member, foreign to the parties; and any decision adopted by majority vote by this Committee, as thus constituted, shall be binding upon the parties."

30. The Union had also asked for a list of probationary and temporary employees hired after the execution of the contract. This the Company agreed to supply.

Counsel for Respondent stipulated at the hearing that Respondent did not submit to the Union any of the requested information enumerated above.

Having been denied the information, the Union explained to the Company at the last meeting on March 18 that there was no point to continued discussions, and sought to invoke the next step in the grievance procedure, namely, intervention by a conciliator of the Puerto Rico Labor Department. However, when asked if he would agree to call in a conciliator, Gonzalez Monclova, the Company's spokesman, replied that this "was not necessary." Thereafter, on March 26, the Union wrote to Respondent reminding it that the Company had refused to submit the data to support "the allegation of economy which according to you was the grounds [sic] for the discharges." The letter then continued:

> as you refused to grant intervention to the Conciliator Bureau to resolve the economic issues, we must take a decision in order to break the impasse. We propose the following:
>
> (1) That an arbitrator decided whether the intervention of a conciliator as provided in the collective-bargaining agreement, may be requested by either of the parties or whether it must be requested by the Committee in full.
>
> (2) That regardless of what the arbitrator may decide regarding the above mentioned, we submit a second issue to him. In this second issue the arbitrator shall determine whether the Company is obliged to present evidence to prove the alleged economy which according to you was the grounds for the discharges.

5. The Union's attempts to seek redress under labor laws of Puerto Rico.

Having received no reply to its information request, the Union sought redress under labor laws of the Commonwealth of Puerto Rico. Article 8(f) of the Puerto Rico Labor Relations Act, 29 LPRA Sec. 69(1)(f), provides that a breach of a collective-bargaining contract shall be an unfair labor practice under that Act. Prior to the events here involved, on November 5, 1962, the Supreme Court of Puerto Rico had entered a decree affirming an order of the Puerto Rico Labor Relations Board dated June 17, 1960, enjoining Respondent from "violating in any manner the terms of the Collective Bargaining Agreement executed with or that may be executed" with the Union, including the grievance and seniority provisions in such contract. The order and decree were based on an unfair labor practice proceeding which, as already noted, involved matters not here in question. On April 1, 1963, the Union requested the Insular Labor Board to move the court to cite Respondent for contempt for violating its decree, on the ground that Respondent had breached its November 8, 1962, contract—

more particularly its grievance clause, because Respondent, *inter alia*, refused to take the necessary steps to process the layoff grievance (which is the subject of the instant proceeding) through a conciliator and an arbitrator. In reply to the Insular Labor Board's request for Respondent's position respecting the two matters the Union had requested to submit to arbitration (i.e., whether a conciliator's intervention may be requested unilaterally by one party and whether Respondent was under a duty to present evidence to prove the economy resulting from the layoffs), Respondent asserted that insofar as the first matter was concerned, the Union "has not presented any grievance alleging the violation of the contract," and that for the second, the Company "is not obliged to present evidence to prove alleged economy" because the management-rights and seniority clauses of the contract "grant this Company the right to terminate personnel."

On April 19, 1963, the Insular Board filed with the Puerto Rico Supreme Court a motion to cite Respondent for contempt of the court's decree of November 5, 1962, as requested by the Union. On May 10, 1963, the court denied the motion "without prejudice," and on reconsideration the Court adhered to this ruling.[31]

Conclusions.

A. *The unilateral subcontracting.*

1. Introduction; the issues and contentions.

As already found, Respondent and the Union have had contractual relations since 1959. In 1960 Respondent embarked upon a huge expansion program conceived and planned in 1958 and 1959 and continued in full swing through 1963. In carrying out its program, Respondent contracted out the work without first consulting with the Union. The subject of subcontracting became a matter of grave concern to the Union and at the very outset of negotiations on the 1962 contract the Union offered a proposal to limit the Company's contractual right to subcontract. The Union continued to press for a subcontracting clause until the end of the negotiations but Respondent rejected it, assuring the Union at the same time that the subcontracts would not affect the unit employees adversely. The contract ultimately signed by the parties is silent on subcontracting but contains a management-prerogative clause, the predecessor (1959) contract did.

31. Counsel for Respondent explained at the instant hearing that the court in effect upheld Respondent's contention, among others, that the court's decree was predicated on an entirely different case and that the appropriate procedure for the Insular Board would have been to bring a new unfair labor practice proceeding charging a breach of the new contract alleged by the Union.

On November 9, 1962, 1 day after the signing of the contract, Respondent unilaterally put into effect the first of a series of layoffs. Altogether 227 unit employees were laid off between November 9, 1962, and March 31, 1963, including employees holding jobs required and utilized in the performance of the subcontracts. As each employee was laid off, he was told that his layoff was due to "reorganization" of the Company. There is no dispute, and I find, that Respondent's decision to subcontract was motivated solely by economic or business considerations.

The basic issue here is whether, as General Counsel contends, Respondent violated its bargaining obligation under Section 8(a)(5) and 8(d) of the Act by entering into subcontracts covering work performed by employees in the bargaining unit without first bargaining about that decision with the Union, the statutory representative of the employees in the unit. Respondent contends that it had the right unilaterally to contract out the work as a matter of management prerogative; that the existing bargaining agreement recognized this prerogative and the Union had thus waived its right to bargain over this matter; that the layoffs effected by Respondent were not attributable to the subcontracts; that none of the subcontracts involved work normally done by the bargaining unit; and that, in any event, Respondent had notified the Union of the subcontracts and layoffs and had given the Union an opportunity to bargain about them.

On the basis of the entire record, and particularly in the light of the considerations outlined below, I reject Respondent's contentions and find that Respondent's unilateral actions with respect to the subcontracts violated Section 8(a)(5) and (1) of the Act.

2. The applicable principles.

As was recently observed in *East Bay Union of Machinists, Local 1304, etc. (Fibreboard Paper Products Corp.)* v. *N. L. R. B.*, 322 F. 2d 411, 414 (C. A. D. C.), Congress "of necessity framed in the broadest terms possible" the scope of the statutory duty to bargain because of its awareness that "collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions." See also *Inland Steel Company* v. *N. L. R. B.*, 170 F. 2d 247, 254 (C. A. 7), cert. denied 336 U. S. 960. For the area of labor management relations is dynamic and constantly evolving. The management prerogatives of yesteryear are mandatory bargaining subjects of today.[32] Noting that subcontracting or con-

32. Examples of former "management prerogatives" may be found in *Inland Steel Company, supra* (compulsory retirement program); *N. L. R. B.* v. *Lehigh Portland Cement Company*, 205 F. 2d 821 (C. A. 4) (company housing); *N. L. R. B.* v. *Niles-Bement Pond Company*, 199 F. 2d 713 (C. A. 2) (Christmas

tracting out is a subject extensively dealt with in today's collective bargaining, the Board, in *Fibreboard Paper Products Corporation*, 138 NLRB 550, enfd. 322 F. 2d 411 (C. A. D. C.), held that a management decision to subcontract work performed in an existing bargaining unit is a mandatory subject of bargaining, notwithstanding an employer's valid economic reason for doing so and the absence of discriminatory motive. To the same effect, see *Town & Country Mfg. Co., Inc., et al.*, 136 NLRB 1022, enfd. 316 F. 2d 846 (C. A. 5). Subcontracting may have a more direct impact upon employees than, for example, even wages, vacations, and ordinary working conditions, for the very existence of employee jobs may, and often does, turn thereon.

It goes without saying that in subcontracting, as in other mandatory bargaining subjects, "the obligation to bargain is not an obligation to agree." *Fibreboard, supra* at 415. All that the statute demand is that the employer give advance notice and bargain in good faith before making commitments. This—and this alone—is the extent of the statutory restriction on the employer's freedom of action. Where that obligation had been satisfied, the employer may lawfully subcontract. As the Board pointed out in *Town & Country, supra* at 1027:

> . . . the duty to bargain about a decision to subcontract work does not impose an undue and unfair burden upon the employer involved. This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. . . .[33]

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bonus); *Richfield Oil Corp.* v. *N. L. R. B.*, 231 F. 2d 717 (C. A. D. C.), cert. denied 351 U. S. 909 (stock purchase plan); *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006-1007 (C. A. 3) (decisions relating to economic layoff); *National Licorice Company* v. *N. L. R. B.*, 309 U. S. 350, 360 (discharges); *N. L. R. B.* v. *Jack Lewis, and Joe Leviton, d/b/a California Footwear Company & Trina Shoe*, 246 F. 2d 886, 888-889 (C. A. 9) (transfers to other plants); *N. L. R. B.* v. *Frank Macknish, Industrial Fabricating, Inc., et al.*, 272 F. 2d 184 (C. A. 6), enfg. 119 NLRB 162, 189-190 (*ibid.*).

33. That advance consultation with the Union in this case would not have constituted a burdensome, impractical, or unfair requirement is evidenced by Respondent's own willingness in Feb-

In enforcing the Board's *Fibreboard* decision and rejecting the employer's claim in that case that "its unilateral action was justified because it was motivated solely by economic necessity," the court gave the same basic rationale for the need of advance union-management consultation, stating (322 F. 2d at 414):

> The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 580-81 . . . (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce.

In short, the therapy of collective bargaining, prescribed by Congress as a means for promoting industrial cooperation and peace, is as important in the area of subcontracting as in others fraught with potential strife.

I find and conclude that Respondent's decision to subcontract was not a management prerogative outside the scope of mandatory bargaining.[34]

3. The impact of the subcontracts on the bargaining unit.

Respondent urges that the subcontracting in this case falls outside the *Fibreboard* and *Town & Country* doctrine for a number of reasons, one of which is that the subcontracts had "no effect at all on the union, the unit members, or the bargaining unit."[35] Respondent claims that the layoffs in this case resulted from "a manpower study [which] revealed a substantial excess in its normal

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ruary to obligate itself "to notify the Union before subcontracting, of its decision to do so," so that the Union might discuss and, presumably, bargain. As already noted, a settlement incorporating such provision fell through because the Union sought compensation for employees adversely affected by Respondent's past subcontracts, which Respondent refused. Respondent thereafter reaffirmed, and in this proceeding still affirms, its right to subcontract unilaterally.

34. I am fully cognizant of the fact that *N. L. R. B.* v. *Adams Dairy, Inc.*, 322 F. 2d 553 (C. A. 8), upon which Respondent relies, is in direct conflict with *Fibreboard*.

35. In both *Fibreboard* and *Town & Country* the employers' subcontracting resulted in the elimination of certain phases of the employers' operations and in curtailment of unit work.

operations" and from the "reorganization" that followed. It argues that to hold Respondent's conduct violative of the Act would be to hold that "the unilateral subcontracting of work" is "*per se* a violation of the Act." General Counsel, on the other hand, contends that the record establishes that the layoffs were attributable to the subcontracting and, in any event, that unilateral subcontracting, without more, constitute a violation.

There may be merit to the contention that unilateral subcontracting is in itself a violation because such action could inherently affect the size of the unit, the employees' opportunities for overtime work, and, indeed, the bargaining representative's effectiveness in securing future contracts favorable to the employees.[36] On the other hand, situations may no doubt arise where, because of the pressing or emergency character of work or for other reasons, it might be impracticable to require the employer to give the union notice to bargain. I do not find it necessary to pass on such an issue in this case, since I am satisfied that the record here amply supports the finding that Respondent's subcontracts were not of such caliber, but at the same time had a profound impact on the unit work and the unit employees.

The record shows that Respondent's expansion program had been under consideration for a considerable period and that construction thereunder had been in progress for at least 3 years. Certainly, the project was not of an emergency character precluding adequate notice to, and reasonable consultation with, the Union. The record shows that Respondent had laid off some 227 unit employees over a 5-month period. These employees could, and did, perform tasks precisely the same as the employees of the subcontractors, including telephone installation, splicing, testing, etc. Employees who had formerly installed "new" telephones in areas of subcontractors' operations ceased installing such telephones and were relegated exclusively to "miscellaneous" tasks such as removal and transfer of existing telephones and changing line cords. The compelling inference is that but for the subcontracting, Respondent could and would have utilized some of the laid-off employees to perform the work of the subcontractors' employees. Respondent had employed some of the laid-off employees for considerable periods. The group included splicers who, according to Vice President Neff, constituted a highly trained group of workmen. It is quite true that the record fails to identify the specific employees affected by the subcontracts, and it may be that some were separated for reasons unconnected to the subcontracts, in-

36. Thus it has been observed that the availability of subcontracting lends "to give management the whip hand in bargaining," and to permit it to say "If you don't behave . . . we'll go [to the subcontractor]." "*Inside v. Outside*," 65 Fortune 215 (May 1962).

cluding "overstaffing."[37] But this is a matter determinable in compliance proceedings and is no bar to a finding that at least some employees were laid off either because they were deprived of work formerly performed by the unit, or work to which they would have been assigned but for Respondent's subcontracting. I so find.

Accordingly, I conclude that, contrary to Respondent's contention, the subcontracts had a measureable impact on the unit work and unit employees.

4. The nature of the unit work and the subcontracting work.

Respondent further contends that the instant case is distinguishable from *Fibreboard* and *Town & Country*, in that the subcontracts here did not involve work normally performed by employees in the bargaining unit. In support of this contention Respondent claims that: (a) the contracted work entailed work under "an extraordinary and unprecedented" expansion program, normally subcontracted in the telephone industry; and (b) this "fact" was recognized by the Regional Director himself when, in certifying the Union, he expressly excluded from the bargaining unit part-time and temporary employees who had worked on special projects in connection with the expansion program.

The short answer to the latter contention is that the exclusion in the Decision and Direction of Election to which Respondent refers covers temporary and part-time employees *of the Company* and not those of subcontractors or third parties. Furthermore, the exclusion of these Company employees from the unit rests on the expectancy of their continued employment rather than on the nature of the tasks performed.

As to Respondent's first contention, it is clear from the record that the Company's expansion program, although huge and unprecedented, was from its very start envisaged as a long-term operation, requiring awards of numerous contracts over a 3- to 5-year period. In addition, as Respondent concedes, the operation required the employment of workmen of the same job classifications as Respondent employs. In my view, subcontracting work for such substantial periods of time, involving the same skills as those of unit employees, does not remove such work from the realm of normalcy. In any event, under the entire record I do not regard the time duration of such contracted work as determinative of whether the work was of the type ordinarily performed by em-

37. Respondent did not adduce evidence supporting Neff's conclusionary testimony concerning the "overstaffing." There is no evidence that the particular laid-off employees worked in an "overstaffed" department or unit—evidence peculiarly within Respondent's possession.

ployees in the unit. Finally, it seems to me that even if Respondent's work was contracted out under an "extraordinary" situation, that would explain only the occasion for its action, not the justification for bypassing the Union. As the Supreme Court has stated, "effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted to bargain about the exceptional as well as the routine . . . working conditions." *The Order of Railroad Telegraphers* v. *Railway Express Company, Inc.*, 321 U. S. 342, 347.

5. The alleged waiver of the Union's right to bargain about subcontracting.

Respondent stresses the claim that the November 8, 1962, contract gave to it the unilateral right "to contract out work without prior consultation with the Union," in support of which it relies on various clauses in the contract (including the management-rights clause) and the negotiations leading up to the contract. The burden of Respondent's argument appears to be that the Union waived its right to consultation and bargaining over subcontracting by reason of its conduct in the negotiations prior to the contract as well as by the terms of the contract itself.

It is quite true that a union may relinquish or waive a statutory right, such as the right here involved to be consulted on a bargainable subject. However, the law is settled that the waiver must be clear and unmistakable and will not readily be implied. *Armstrong Cork Company* v. *N. L. R. B.*, 211 F. 2d 843, 848 (C. A. 5); *The Timken Roller Bearing Co.* v. *N. L. R. B.*, 325 F. 2d 746 (C. A. 6). Even past failure by a union to assert a statutory right does not estop subsequent assertion. *N. L. R. B.* v. *Southeastern Rubber Mfg. Co., Inc.*, 213 F. 2d 11, 15 (C. A. 5); *Pacific Coast Association of Pulp and Paper Manufacturers* v. *N. L. R. B.*, 304 F. 2d 760, 763-765 (C. A. 9).

Tested by these criteria, I find that the Union did not waive its right to be consulted before Respondent let its subcontracts. Subcontracting was a matter of grave concern to the Union which, as it had informed Respondent, it deemed to be a threat to the job security of the employees in the unit. The matter continued to be a burning issue even after the signing of the contract. As we have seen, during the negotiations the Union presented two separate proposals designed to limit Respondent's right to subcontract. In its letter of June 8, 1962, the Union expressly complained to Respondent that the subcontracting "is directly harming the employees." During the September 15 meeting, two members of the Union's negotiating committee again protested to Respondent what they regarded to be the adverse effects of the subcontracts on employment. At the next meeting, September 18, the Union's attorney further made it clear that the Union was relying on the

Board's *Fibreboard* and *Town & Country* decisions insofar as the Union's right to consultation was concerned. Respondent consistently rejected the Union's attempts to restrict its right to subcontract, assuring the Union at the same time that the subcontracts would not affect the jobs of the employees. At Respondent's request, further discussion of the matter was deferred until the last bargaining session on October 24 and 25. At the end of that session, two disputed clauses remained on the agenda—the Company's proposed union-security clause and the Union's subcontracting clause. Respondent ultimately withdrew the union-security clause and a contract was agreed upon excluding both clauses.[38]

Thus, the record does not support a finding that the Union's conduct in the negotiations amounted to an unequivocal waiver of its statutory right to bargain on subcontracting. I cannot accept Respondent's conception that the Union in the final bargaining session gave up its subcontracting clause in "exchange" for the Company's withdrawal of the union responsibility clause or any other clause.[39] Certainly, the Union did not "knowingly" waive its right to bargain on subcontracting. *N. L. R. B. v. Gulf Atlantic Warehouse Company*, 294 F. 2d 475, 477 (C. A. 5). Considering all of the circumstances, including the Company's assurances during the negotiations that subcontracting would not affect the unit and the further fact that no layoffs actually took place until after the signing of the contract, the reasonable reference is, and International Representative Sanchez so testified, that the Union had decided to go along with a contract without a subcontracting clause, relying on the advice of its counsel that the "decisions by the National Labor Relations Board . . . *would offer protection to the workers* as far as subcontracting goes." Cf. *N. L. R. B. v. The Hoe Co.*, 220 F. 2d 956, 958-959 (C. A. 5).

Nor can I accept Respondent's contention that the various

38. Although Gonzalez Moncfova, the company representative, testified on direct examination that both clauses were withdrawn, on cross-examination he could not recall anything that was said about the Union withdrawing its subcontracting clause. He also conceded that while the minutes of the last meeting (which he prepared for the Company and inspected at the hearing) expressly recited that the Company had withdrawn the union-security clause, nothing contained therein indicated that the Union withdrew its subcontracting clause.

39. In this connection Respondent points out that the Company had agreed to the modification of its original management prerogative proposal. The modification (to the effect that the Company would use such clause for economic and not discriminatory purposes) is merely a restatement of Respondent's obligation under law, and it is hard to believe that the Union would have accepted this modification as a *quid pro quo* for the alleged waiver.

clauses in the contract, considered either separately or collectively, accorded it the right to subcontract unilaterally. Under the management-prerogative clause upon which Respondent relies, the Company reserved control over certain matters, except as expressly limited by the terms of the agreement.[40] Under the "labor relations" clause (article IV), on which Respondent also relies, the parties acknowledged that they had "unlimited" opportunity to negotiate, that all their "decisions and covenants" appear in the contract, and that the working conditions set forth in the contract would be the only ones governing the relations between the parties. Other clauses cited by Respondent include those relating to seniority (article XX), which deals with the computation of seniority and its applicability in promotions and layoffs; grievance, which, as we have seen, defines grievances and prescribes the method for processing same; and strikes and lockouts (article XII), under which the Union agreed to utilize the grievance procedure rather than resort to strikes. None of these clauses make specific reference to subcontracting, and practically all (certainly the more relevant, dealing with management prerogatives and labor relations) were embodied in substantially similar language in the antecedent 1959 contract before the subcontracting issue arose. It seems to me that a showing of surrender by the Union of its all-important statutory right to bargain over subcontracting has to be established by plain and unequivocal expression, rather than a meaning to be inferred from a juxtaposition of discrete clauses. The "general philosophy of the Act and the general desirability of joint participation and responsibility suggest that any . . . reservation of power [i.e., unilateral action on a mandatory bargaining subject] must be clearly described and delimited in the contract." *N. L. R. B.* v. *Otis Elevator Co.*, 208 F. 2d 176, 178-179 (C. A. 2). "Silence in the bargaining agreement on such issue does not meet the test." *The Timken Roller Bearing Co.* v. *N. L. R. B.*, 325 F. 2d 746 (C. A. 6).

Accordingly, I conclude that neither the terms of the contract nor the negotiations leading thereto, support Respondent's con-

40. This clause (article IV), entitled "Rights Reserved to the Employer," states: "Except as expressly limited by the terms of this Agreement, the Company retains and shall retain sole control over all matters concerning the operation, management and administration of its business, including, but without this being construed as a limitation, the administration and management of its departments and operations, the organization and methods of work, the assignment of working hours, the direction of the personnel, the right to hire, reclassify, transfer, discipline, suspend, separate or pension employees, and all functions inherent in the administration and/or management of the business. The above mentioned rights shall be used for economic and administrative purposes and not to discriminate against the Union or any of its members."

tention that the Union agreed to, or acquiesced in, unilateral subcontracting by Respondent. At best the matter was left unresolved and the Union's right to consultation over it remained unimpaired.

6. Respondent's contention that it satisfied its duty to bargain:

Finally, Respondent contends that although it was not obligated to do so, it notified the Union of its subcontracting and the layoffs and thus provided the Union with opportunity to meet and bargain thereon.

As to subcontracting, Respondent stipulated at the hearing that it never gave the Union notice of any specific subcontracting decision. It is likewise clear, and I find, that Respondent never consulted the Union on implementing any unilateral decision to subcontract and that Respondent entered into all subcontracts herein involved without prior notice to the Union. While Respondent from time to time met with the Union to receive the latter's protests of the Company's actions, it maintained its position that it had the unilateral right to subcontract and that it would continue to do so in order to complete its expansion program. Here, as in *Fibreboard*, *supra*, "This position was consistent with the Company's belief that contracting out was exclusively a 'management prerogative' about which it could take unilateral action without first bargaining to impasse with the Union." (322 F. 2d at 413.). And here, as there, the Company's action constituted a refusal to bargain. Clearly, talking about a decision after it is a fait accompli, is not the same as bargaining about it. *Town & Country Mfg. Co.*, 136 NLRB 1022, 1030, enfd. 316 F. 2d 846 (C. A. 5); *Robert S. Abbott Publishing Company*, 139 NLRB 1328, 1329."

Having found that Respondent's decision to contract out work and its action in thereafter contracting out the work were unlawful, it follows that the layoffs of the unit employees resulting from this unlawful conduct were likewise unlawful. I cannot accept Respondent's contention that its unlawful action respecting subcontracting was "cured" by subsequent notification to and discussion with the Union concerning the layoffs.[41] To begin with,

41. As already noted, Respondent's industrial director, Orellana, testified that although the Company did not feel obligated to give any layoff notice, it did do so "out of courtesy." Orellana indicated that after management made its decision to effect a layoff, he verbally communicated this decision to the Union, giving it the number in "round figures" but not disclosing the identity of the individuals or job classifications affected since he himself did not have the information. According to Orellana's own testimony, the Union received not more than 1-day notice between announcement of the decision and the actual layoff on November 16. No notice whatsoever was given regarding the November 9 layoff. Subsequent

the discussions took place after the shrinkage of work opportunities had already occurred as a result of the unilateral subcontracting. Thus, the layoff discussions were necessarily limited to exploration of possible means of minimizing the impact of the earlier unlawful action—an exploration which proved abortive. While absence of such later discussions might have compounded the earlier unlawful conduct, the mere fact that the parties saw fit to talk about the subject did not operate to erase the prior illegality. In addition, it is noteworthy that the discussions took place after Respondent had already made its decision and was contractually committed to third parties under the subcontracts; hence, the practical utility of discussions under these circumstances is open to serious question. See *Town & Country Mfg. Co., supra*, at 1030. Cf. *The Stilley Plywood Company, Inc.*, 94 NLRB 932, 969, enfd. 199 F. 2d 319 (C. A. 4); *N. L. R. B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006-1007 (C. A. 3).

Accordingly, I reject Respondent's contention that its conduct respecting the layoffs operated to "cure" its prior illegal conduct respecting the subcontracting, as well as its other contentions that the Union had waived its right to bargain about the subcontracting, that the subcontracting did not involve unit work and had no impact on the bargaining unit, and that its subcontracting, in any event, was a management prerogative outside the scope of mandatory bargaining.

B. *The refusal to submit information.*

1. As we have seen, throughout the period here involved the Union protested Respondent's unilateral subcontracting and contended that the layoffs had resulted therefrom. The Company took the position that subcontracting was a management prerogative, that the labor contract accorded it this prerogative, and that, in any event, the layoffs resulted from an economic reorganization for economy reasons and not from subcontracting. The parties met on several occasions in November 1962 at formal and informal grievance meetings to discuss the layoffs, and again in February 1963 to discuss Respondent's right to subcontract generally. They met again between March 9 and 18, 1963, to discuss the layoff of March 8, first at general and then at grievance committee sessions. In the course of these meetings, the Union requested Respondent "to prove" its contention that the layoffs were due to "economic reorganization," requesting data to support the Company's allegations of "economy" and savings allegedly resulting therefrom. The requested data covered such matters as volume of business and

to the layoffs the parties discussed the Union's protests both in and outside of grievance meetings. At the end of one such meeting Respondent agreed to and did recall several employees, who were then again laid off.

earnings during specified periods, wage savings, and information as to who was performing the work of the terminated employees. Respondent refused to submit any of the requested information and the Union thereupon sought to invoke the next step in the grievance procedure after grievance committee meetings, namely, the intervention of a conciliator. When Respondent failed to go along with this step, the Union proposed to submit the following two matters to arbitration, the last step in the grievance procedure: (a) whether the intervention of a conciliator may be invoked by one of the parties without the consent of the other; and (b) whether Respondent was duty bound to support its claim that the layoffs were effected for economy reasons. Respondent refused to go along with this procedure also, taking the position that the Union had not presented a "grievance alleging the violation of the contract"; and that it was under no obligation to prove "economy" because the management-rights and seniority clauses of the contract vested in the Company the right to terminate personnel.

Respondent's position in this proceeding, as asserted in its brief (pp. 17-18, 33-36), appears to be that it was not legally bound to furnish the requested information because: (a) the Union had not "exhausted the administrative remedies" provided in the contract, i.e., it proceeded to submit issues to conciliation and arbitration before full consideration thereof by the grievance committee; (b) the information was requested not to prove a violation of the contract[42] but "to put at issue . . . whether or not the decision of Respondent to lay off had been economically sound"; and (c) the dispute between the parties involves an "interpretation of a collective-bargaining contract"—i.e., whether Respondent's decision to lay off was a "management prerogative"—which is a matter to be decided not by the Board in an unfair labor practice proceeding but by the parties through the contractual grievance procedure.

2. It is settled law that an employer is obligated to furnish information requested by the statutory representative of its employees if such information is relevant to a grievance or is otherwise needed by the Union to carry out its statutory role as bargaining agent, including the administration of the bargaining agreement. *Boston Herald Traveler Corporation* v. *N. L. R. B.*, 223 F. 2d 58 (C. A. 1); *J. I. Case Company* v. *N. L. R. B.*, 253 F. 2d 149, 152-153 (C. A. 7). The scope of the information to be made available for such purpose is necessarily broad—it "must be disclosed unless it plainly appears irrelevant." *N. L. R. B.* v. *Yawman & Erbe Manufacturing Co.*, 187 F. 2d 947, 949 (C. A. 2); *Boston Herald Traveler Corporation*, *supra*.

3. Respondent does not appear to dispute the fact that the

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42. As already noted, the contract defines a grievance as an "allegation made by one or more employees of a violation or violations of the contractual provisions established in this Agreement."

information requested by the Union was relevant to the issue—raised both generally and in connection with the processing of the grievance—as to whether the layoffs were the result of an "economy" drive or the subcontracting. I find that the requested information was relevant in order to enable the Union to evaluate intelligently the pending grievance it was then attempting to process. Respondent's claimed economy having been advanced as an "argument . . . important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 152-153.

I further find that the requested information was also relevant in order to enable the Union to perform its statutory obligation in administering the bargaining contract. As we have seen, Respondent and the Union have had a running dispute about the cause of the layoffs ever since the first layoffs of November 9, 1962. With the March 8 layoff, a total of 170 unit employees had been laid off. Obviously, with the requested information in its hands, the Union could in future layoffs, as well as in the pending layoff, be "in a better position to advise an employee about his rights, to reject those employee claims which are not supported by the facts, and to protect the rights of employees generally in properly administering the contract." *The Timken Roller Bearing Co.* v. *N. L. R. B.*, 325 F. 2d 746, 753 (C. A. 6).

Respondent's basic position is that the requested information was irrelevant because it "put at issue" a decision which it regarded to be a management prerogative under the bargaining contract; and that the information did not pertain to a contract violation, the only matter grievable under the contract. However, this contention—as well as its additional contention that the Union had invoked conciliation and arbitration prematurely and in violation of the terms of the grievance clause[43]—rests on the erroneous

43. In view of the disposition herein made regarding the refusal to furnish information issue, I do not regard it essential to pass upon this contention. In any event, I find that the Union had fully complied with the grievance procedure in seeking the intervention of a conciliator and then arbitration. The undisputed evidence shows that the parties had met at grievance committee meetings on at least three occasions, and before then for general discussions on three other occasions, to consider the March 8 layoff. Respondent throughout adhered to the position that the layoffs of the individuals involved were the result of economy measures and had nothing to do with subcontracting. When requested to submit data to establish its position, Respondent refused to do so. At this juncture the Union's only alternative, if it were to seek redress under the contractual grievance procedure, was to invoke the next succeeding steps, namely the assistance of a conciliator and then arbitration.

assumption that the Union's right to the information turns solely on the terms of the contract. It is apparent that the Union's right to the information exists apart from any contractual provisions—in order to carry out its statutory obligation adequately to represent the unit employees laid off by Respondent in connection with the subcontracting. As in *Timken Roller Bearing Co., supra*, at 751, "the Union's right to [the] information it needed to administer the bargaining agreement was a right which it had under Section 8(d) of the [Act], and the existence of this right was not dependent upon it being included in the bargaining agreement. It was not a right obtained by contract, such as would be the case in increased wages, longer vacations, pension rights, and certain so-called fringe benefits. The failure to have the right recognized by the Company in the bargaining agreement, which would probably eliminate the necessity of possible litigation over it later, does not mean that it does not exist by virtue of the statute."[44]

4. It is true that the Board has frequently in the past declined to exercise jurisdiction where a dispute has been, or could have been, submitted to arbitration under the parties' bargaining contract.[45] The Board's declination of jurisdiction in these cases was purely discretionary, since Section 10(a) of the Act expressly provides that the Board's jurisdiction "shall not be affected by any other means of adjustment or prevention that has been established . . . by agreement, law or otherwise . . ." *Carey, Inc.* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 269. In any event, the cases in which the Board has given "hospitable acceptance" to the arbitral processes are those in which the disputed rights turned on the interpretation of contract terms, had been submitted to arbitration or could have been submitted to arbitration, and both parties were willing to utilize binding arbitration to settle the dispute.[46] In the instant case, the very fact that Respondent

44. In its brief Respondent does not specifically claim that the Union waived its right to the requested information by the terms of the contract. If such claim, however, is implicit from its position that the management-prerogative clause gave it unrestricted freedom to act unilaterally respecting subcontracting and layoffs, I reject it on the ground, already noted (in connection with my analysis and discussion under section A, 5, *supra*) that a waiver of a statutory right, to be effective, must be clear and unmistakable and is not readily to be implied.

45. See *Consolidated Aircraft Corporation*, 47 NLRB 694, 705-706; *United Telephone Company, et al.*, 112 NLRB 779, 781-782; *Hercules Motor Corporation*, 136 NLRB 1648.

46. *Ibid.* Even in such situations the Board will not give effect to an arbitrator's award "which is at odds with the statute," *Monsanto Chemical Company*, 97 NLRB 517, 520, enfd. 205 F. 2d 763 (C. A. 8), "Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence . . ." *Carey* v. *Westinghouse Electric Corp.*, *supra*, at 272.

resisted arbitration and, as the Union's proposed submission to arbitration indicates, there existed a question as to whether either party could unilaterally invoke the step preceding arbitration (intervention of a conciliator), militates against deferral of the dispute by the Board to arbitration. In addition, as already pointed out, the Union's right to the information here turns not on contract construction but on the statute. As in *Timken Roller Bearing, supra*, at 752, "Whether the demand of the Union should be honored, accordingly, does not involve the interpretation or application of the agreement, which is necessary in order to be eligible for arbitration, but, on the contrary, involves the interpretation and application of the National Labor Relations Act."[47] See also *California Portland Cement Company*, 101 NLRB 1436, 1439.

5. In my view, the considerations just referred to distinguish *Hercules Motor Corporation*, 136 NLRB 1648; and *Sinclair Refining Company* v. *N. L. R. B.*, 306 F. 2d 569 (C. A. 5), relied on by Respondent. Unlike here, both of those cases turned on the circumstance that the dispute involved solely an interpretation of the contract which both parties were willing to resolve expeditiously by arbitration under a contractual grievance-arbitration provision which was clear and unambiguous. See *Timken Roller Bearing, supra*, at 753; *Sinclair Refining Company*, 145 NLRB 732. Moreover, as the Board explained in the latter case (the most recent one on the subject) in commenting upon its prior *Hercules* and *Timken Roller* decisions, "*Hercules* did not hold that every request for information in the context of a dispute over the meaning of a contract provision may only be disposed of under the grievance-arbitration

47. In *Timken Roller Bearing* v. *N. L. R. B.*, *supra*, *at* 751, 752, the court upheld the Board's finding that the Company had unlawfully refused to bargain by refusing to submit wage data sought in connection with the processing of a grievance and the administration of the contract. Under the contract, the Company was given "discretion" to establish new rates under certain circumstances. The Union protested the rates set up by the employer as unfair and improperly established, and it filed a grievance in the course of which it requested information. It later filed unfair labor practice charges after the employer's refusal to supply the information. There, as here, the Company contended that the Union merely raised a question of contract interpretation disposable under the grievance-arbitration clause. The court rejected this contention despite the fact, which it specifically noted, that the contract expressly stipulated that the grievance-arbitration machinery provided "adequate means" for the adjustment and disposition of "any complaints or grievances"; and that the employer was willing to submit the matter to arbitration and comply with the arbitrator's ruling.

process established by the contract. The existence or utilization of a grievance-arbitration clause does not relieve an employer of its duty to furnish a union with information needed to perform its statutory functions. Indeed, *Timken* specifically distinguishes *Hercules* in pointing out that the respondent in *Timken* had not met its bargaining obligation when it denied information which was relevant to the union's responsibility in 'policing or administering a contract, or adjusting a grievance.' "[48]

For all of the foregoing reasons, I find that and conclude that Respondent's failure and refusal to make available the information requested by the Union, in connection with the processing of its grievance and for the purpose of administering the bargaining contract, constitutes a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

IV. THE REMEDY.

Pursuant to Section 10(c) of the Act, I shall recommend that the Respondent cease and desist from engaging in the unfair labor practices found and from like and related conduct.

As for affirmative relief, it appears, as I have found, that Respondent's unilateral subcontracting was not motivated discriminatorily, but solely by economic considerations. It also appears that the subcontracts were let under an expansion program directed by the Public Service Commission of Puerto Rico, in order to improve and expand the telephone service in the Commonwealth. It further appears that most, if not all, of the subcontracts have already been completed and that it will serve no useful purpose to require Respondent to cancel the subcontracts, if any, that are still uncompleted, even though they were entered into without prior consultation with the Union. I shall, however, recommend that Respondent cease and desist from unilaterally entering into such contracts in the future and that it bargain with the Union concerning the effects upon the unit employees of its past unlawful conduct, i.e., the subcontracts unilaterally entered into under which unit work was performed during the complaint period, November 9, 1962, to March 31, 1963. I shall further recommend that Respondent offer immediate reinstatement and make whole those unit

48. Compare *Hekman Furniture Company*, 101 NLRB 631, 632, enfd. 207 F. 2d 561 (C. A. 6), wherein the Board stated that, " 'the collective bargaining requirement of the Act' is not satisfied by a substitution of 'the grievance procedure of the contract for [the employer's] obligation to furnish the Union with information it needed to perform its statutory functions.' " See also *Leland-Gifford Company*, 95 NLRB 1306, 1322, enfd. 200 F. 2d 620, 624 (C. A. 1); *J. I. Case Company v. N. L. R. B.*, 253 F. 2d 149, 154 (C. A. 7).

employees laid off as a result of Respondent's unlawful actions. Cf. *Fibreboard Paper Products Corporation*, 138 NLRB 550, 555, enfd. *sub nom. East Bay Union of Machinists, Local 1304, etc.*, 322 F. 2d 411 (C. A. D. C.)[49] As has already been noted (section A, 3, *supra*), the record does not identify the specific employees affected by the subcontracting, and it may be that the layoffs of some of the 227 unit employees was unrelated to the letting of the contracts. This is a matter that may be determined in the compliance proceeding.

Since I have also found that Respondent has unlawfully refused to furnish the Union relevant information in support of its position, in the grievance negotiations and other discussions, that the layoffs were effected for purposes of economy and not as a result of the subcontracting, I shall recommend that Respondent furnish the Union with such information and data as will tend to substantiate its claim and will enable the Union to discharge its function as statutory representative of Respondent's employees. This is not to say that Respondent must furnish the Union the information in the precise form and manner requested by the Union, so long as the information submitted will enable the Union to evaluate Respondent's position and thereby discharge its statutory duty. See *The Cincinnati Steel Castings Company*, 86 NLRB 592, 593; *The Ingalls Shipbuilding Corporation*, 143 NLRB 712.

Conclusions of Law

Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by the following conduct: (1) by unilaterally subcontracting work performed by employees in the bargaining unit, without advance notice to the Union and without affording it an opportunity to bargain respecting the subcontracting; and (2) by refusing to furnish the Union relevant information in support of its position, during the grievance negotiations and other discusssions, that the layoffs resulted from an economy drive and not from subcontracting.

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49. In accordance with usual requirements, reinstatement shall be to the employees' former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, with backpay from the dates of their layoffs to the date of Respondent's offer of reemployment, less net earnings during said period. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon as specified in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Respondent, Puerto Rico Telephone Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally contracting out work of the nature performed by employees in the bargain unit, without prior notice to, and opportunity for negotiation with, Sindicato de Trabajadores Packinghouse, United Packinghouse, Food & Allied Workers, District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963, or any other union selected as the exclusive representative of the employees in the appropriate bargaining unit. The appropriate bargaining unit consists of:

All nonsupervisory employees of Respondent, including all regular employees, probationary employees, messengers, and mail clerks, but excluding all executives, company officers, department heads, division heads, zone supervisors, section heads, district and geographical subdivision heads; foremen; secretaries to company officers, executives, and department heads; all employees of industrial relations department except messengers and mailclerks; directory salesmen; commission salesmen; all professional and technical employees; all guards and supervisors as defined in the Act.

(b) Refusing, upon request, to furnish the above-named Unions with such information and data as will, or as may tend to, substantiate Respondent's position respecting the cause of the March 8, 1963, layoff.

(c) In any like or related manner interfering with the efforts of the above-named Unions, to bargain collectively with Respondent on behalf of employees in the appropriate unit.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Unions as exclusive bargaining representative of its employees in the appropriate unit, with respect to the contracting out of work of the nature performed by employees in the appropriate unit.

(b) Upon request, bargain collectively with the above-named Unions as the exclusive bargaining representative of its employees in the appropriate unit, concerning the effects of the subcontracting heretofore unilaterally entered into by Respondent under which unit work was performed during the period November 9, 1962, through March 31, 1963.

(c) Offer those employees laid off as a result of Respondent's unlawful action immediate and full reinstatement and make them whole, in the manner set forth in the section of this decision entitled, "The Remedy."

(d) Upon request, furnish the above-named Unions with such information and data as will, or as may tend to, substantiate Respondent's position respecting the cause of the March 8, 1963 layoff.

(e) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to determine the rights of reinstatement and the amounts of backpay due under the terms of this Recommended Order.

(f) Post at its main office and central offices wherein (or under whose direction) employees in the appropriate unit are employed, copies of the attached notice marked "Appendix."[50] Copies of said notice, to be furnished by the Regional Director for Region 24, shall, after being duly signed by the Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 24, in writing, within 20 days from the date of the receipt of this Decision and Recommend Order, what steps Respondent has taken to comply herewith.[51]

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50. In the event that this Recommended Order shall be adopted by the Board the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

51. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT contract out work of the nature performed by employees in the bargaining unit without first giving Sindicato de Trabajadores, Packinghouse, United Packinghouse Food & Allied Workers, District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963, notice of our intention to contract out such work and an opportunity to bargain over it.

WE WILL, upon request, hereafter bargain with the above-named unions before contracting out such work.

WE WILL, upon request, bargain with the above-named unions about the effects of the unit work we heretofore contracted out.

WE WILL offer those employees laid off as a result of contracting unit work during the period November , 1962, to March 31, 1963, reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will make them whole for any loss of pay suffered as a result of their layoff.

WE WILL, upon request, furnish the above-named unions with such information and data as will, or as may tend to, substantiate our position respecting the cause of a layoff.

PUERTO RICO TELEPHONE COMPANY,

Employer.

Dated ..... By .....

(Representative) (Title)

NOTE.—We will notify the employees, entitled to reinstatement, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, P.O. Box 11007, Fernandez Juncos Station, Santurce, Puerto Rico, Telephone No. 724-7171, if they have any questions concerning this notice or compliance with its provisions.

APPENDIX E.

Translation

IN THE SUPREME COURT OF PUERTO RICO.

Puerto Rico Telephone Company, *Petitioner*, *vs.* Puerto Rico Labor Relations Board and Unión de Empleados de la Industria del Teléfono de Puerto Rico, etc., *Defendants.*	P.R.L.R.B. 64-5 Revision

Chamber composed of its President, Associate Justice Mr. Belaval, and of Associate Justices Messrs. Hernández Matos and Santana Becerra.

Opinion of the Court delivered by Associate Justice Mr. Santana Becerra:

San Juan, Puerto Rico, April 13, 1965

On October 7, 1963 Unión de Empleados de la Industria del Teléfono filed a charge with the Puerto Rico Labor Relations Board against Puerto Rico Telephone Company. The Union charged the Company that it had violated and continues to violate Section 4 of Article XV of the Collective Bargaining Agreement in effect between the parties upon refusing to request the assistance of the Conciliation and Arbitration Bureau of the Labor Department in order to obtain a final settlement or agreement with respect to

the mass lay-offs made by the Company of members of the charging Union.

Based on such charge, on November 20, 1963 the Board issued a complaint, case CA-2915, charging the Telephone Company of an unfair labor practice consisting in a violation of the Collective Bargaining Agreement. This charge was based on the following facts alleged in the complaint: That on November 8, 1962 the Company and the Union signed a Collective Bargaining Agreement to be in effect until October 27, 1964; that Article XV of the said Agreement provided a procedure to dispose of grievances that may arise in connection with the contractual provisions; that towards the end of September, 1963, 43 employees of the Company alleged that they were suspended from employment in violation of the Collective Bargaining Agreement and the matter had been submitted to the Grievance Committee created by the Agreement; that the Union delegates in the Grievance Committee requested certain information from the Company in order to determine if the suspension of the regular employees was justified; that the Grievance Committee was unable to reach an agreement because the Company refused to submit such information; that thereupon the Union invoked subparagraph (c), Section 4 of Article XV of the Agreement that permits the assistance of the Conciliation Service and that the Company refused and continues to refuse the intervention of the Conciliation Service and has also refused to designate a fifth member to discuss such intervention of the Conciliation Service as well as the relevancy of the information requested by the Union.

The Telephone Company answered the complaint and stated its position. Among other affirmative defenses it claimed that the Board lacked jurisdiction on the matter because the National Labor Relations Board had basically

assumed jurisdiction over the same facts through the issuance of a complaint already heard before a Trial Examiner, case No. 24-CA-1739, and that on such date the case was pending decision by the National Labor Relations Board.

The Agreement.

Article XV of the applicable Collective Bargaining Agreement in the first section thereof provides: "For the purposes of this Agreement, a grievance is defined as the allegation made by one or more employees of a violation or violations of the contractual provisions established in this Agreement." The Grievance Committee is created by Section 4 of said Article XV and it is composed of two representatives of the Company and two Union representatives to meet in private with authority to investigate the cases referred to the Committee, present evidence, call witnesses and decide the case by majority. Subparagraph (c) of Section 4, reads that:

> "If this Committee should fail to agree, it shall appeal to the Conciliation Service to help the parties in coming to an agreement, save in cases where the parties decide not to used said Service. Should the parties fail to come to an agreement even thus, it shall by majority vote appoint a fifth member, foreign to the parties, and any decision adopted by majority vote by this Committee, as thus constituted, shall be binding upon the parties."

Section 5 of Article XV provides that if an employee considers his suspension or lay-off unjust he may present his grievance to the Union and the latter to the Company who shall call the Grievance Committee to settle the matter. If the Grievance Committee considers the suspension or lay-off unjustified the employee shall be reinstated without prejudice to his seniority rights and with back wages. See-

tion 6 provides that any decision rendered pursuant to the grievance procedure shall only apply to the grievance involved and shall not be a mandatory precedent for future grievances nor for the interpretation of the Agreement.

Other provisions of the Agreement that have a bearing on the question at issue appear in Article XX relating to "seniority" wherein it is provided that the Company shall take into account the qualifications of an employee for promotions and lay-offs and that seniority shall prevail in case qualifications of employees to be considered are the same, but shall not be used against an employee who by his ability, competence, efficiency and better service record is more useful than another who merely has been employed for a longer period. In Article V it is provided that the parties acknowledge that the Agreement contains all the working conditions that have been agreed which are the only working conditions to govern the relations between the parties. Article XIII provides for Union Shop.

Of basic application is Article IV, "Rights Reserved to the Employer", providing as follows:

> "Except as expressly limited by the terms of this Agreement, the Company hereby retains and shall retain sole control over all matters concerning the operation, management and administration of its business, including, but without this being construed as a limitation, the administration and management of its departments and operations, the organization and methods of work, the assignment of working hours, the direction of the personnel, the right to hire, reclassify, transfer, discipline, suspend, separate or pension employees, and all functions inherent in the administration and/or management of the business. The above-mentioned rights shall be used for economic and administrative purposes and not to discriminate against the Union or any of its members."

Proceedings Before The National Labor Relations Board.

On the basis of charges filed by the Union against the Company on March 20, 1963 claiming that the Company had incurred and continues to incur in unfair labor practices affecting commerce pursuant to the National Labor Relations Act, the National Labor Relations Board, after determining that the Telephone Company was engaged in commerce within the meaning of the Federal Law, assumed jurisdiction and issued a complaint against the Company on August 15, 1963. In the complaint it was alleged that on November 8, 1962 the Company and the Union signed a Collective Bargaining Agreement to expire in 1964; that said Agreement contained no provision relating to the contracting-out of unit work with third persons; that there was a no-strike clause as well as a clause for the discussion and adjustment of grievances by a Grievance Committee. That on various occasions, in November 9, 16 and 23 and December 1, 1962, and in March 8, 1963, the Company had contracted with others substantial amount of unit work covered by the Agreement without giving the Union in any of such occasions previous notice and the opportunity to bargain thereon, and that as a consequence of such acts it had laid-off a considerable number of employees, [about 157] up to March 8, 1963; that on March 14th the Union submitted the March 8th lay-offs to the Grievance Committee and on March 18th the Grievance Committee met and the Union requested the Company certain information that would permit the Union to continue proceedings before the Committee. Such information included: (1) Volume of business during the months of January, February and March 1963 as compared to November 1962 when the Agreement was signed; (2) the income derived by the Company from its volume of business; (3) the amounts

saved by the Company representing the salaries of those laid-off; (4) if others were performing the work of the personnel that had been laid-off, and (5) how much would the Company save. It was claimed that the Company on such occasion and at any time refused to furnish the above information.

It was further alleged that since November 13, 1962 the Union was protesting the practice of the Company of contracting-out work covered by the Collective Bargaining Agreement and the termination of employment without giving the Union previous notice nor the opportunity to bargain in connection therewith, and that the Company repeatedly refused to cease such practices alleging that it had the right to unilaterally contract work with others and to terminate employment without bargaining with the Union.

Based on the acts above described the Company was charged with unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act inasmuch as such acts substantially affected commerce among the several States of the Union and between the same and Puerto Rico, and tended to create labor disputes obstructing such commerce. A hearing was held between October 7 and November 6, 1963,* that is, prior to the date—November 20, 1963—in which the complaint was issued by the Puerto Rico Labor Relations Board.

On November 20, 1964 the National Labor Relations Board decided the controversy and therefore it had already been decided when oral argument was received in this case on December 17, 1964 and when it was finally submitted to our decision on January 28, 1965. 149 NLRB # 84; Vol. 57 LRRM, page 1397. Both because we take judicial knowl-

* 149 NLRB No. 84.

edge of the decisions of the National Labor Relations Board as because the complaint before that Board is part of the evidence in this writ of revision and is an essential fact involved in the issue of jurisdiction, *a fortiori* we must take into account the decision of the National Labor Relations Board as well as its findings of fact and conclusions of law upon deciding this case.

The National Labor Relations Board has entered an all embracing and ample decision on the matter in controversy without any omissions. It firstly decided that the Company falls within its jurisdiction and it assumed full jurisdiction over the whole controversy. Secondly, that the Company had incurred in unfair labor practices within the meaning of the National Labor Relations Act upon pursuing a conduct of contracting-out work covered by the Collective Bargaining Agreement without previously bargaining with the Union thereby causing the lay-offs of large groups of its employees that form part of the bargaining unit. The Board rejected the contention of the Company to the effect that it could contract-out work with others and as a consequence that it could lay-off employees without having to submit the matter to bargaining pursuant to the management prerogatives for the administration and direction of the business contained in the management clause of the Agreement (Article IV) and the provisions of Article V, hereinbefore quoted. The Board decided that the Company had the duty to bargain with the Union before such contracting-out even if the Agreement was silent on the matter and Article V provided that all working conditions to govern were those included in the Agreement; and that therefore the Company had violated and continues to violate Section 8(a)(5) and (1) of the Federal Law.

Thirdly, the National Labor Relations Board decided that the Company had incurred and continues to incur in

an unfair labor practice—refusal to bargain in good faith—upon refusing to furnishing the information requested by the Union during the proceedings of the Grievance Committee. It was the holding of the Board that the requested information was relevant and necessary so that the Union could intelligently evaluate and consider the situation pending before the Grievance Committee relative to the mass lay-offs and the unilateral contracting-out with third parties of work covered by the Agreement, as well as that such information was also necessary to allow the Union to discharge its duty under the law in the administration of the Collective Bargaining Agreement. The Board held, contrary to the contention of the Company, that the right of the Union to obtain such information did not depend on the terms of the Agreement, that it was not of a contractual nature but that it was a legal right arising from Section 8(d) of the National Act which was not dependent upon whether it was included or not in the Collective Bargaining Agreement.[1]

The National Labor Relations Board sets forth the fact that after the March 18th discussions within the Grievance Committee without reaching an agreement, the Union requested the intervention of a Conciliator which was refused by the Company determining it unnecessary. The Union then proposed to submit to arbitration whether the intervention of a Conciliator as provided in the Collective Bargaining Agreement could be unilaterally requested by any

1. In this respect the Board stated affirming its jurisdiction and evidencing its attitude of not ceding the same that even though on occasions the Board had permitted that a similar question be submitted to arbitration, this was discretionary and that in this case it was retaining jurisdiction, firstly, because the issue did not revolve as to the interpretation of the contract but that the right to obtain the information was a legal right of the Union and, secondly, because the Company was resisting arbitration and furthermore there was the problem if any of the parties could unilaterally invoke the assistance of the Conciliation Service.

of the parties or if it had to be requested by the Grievance Committee's full membership; and independently of what the Arbitrator could decide in connection with the foregoing, that it also be submitted to determination if the Company was obligated to furnish evidence regarding the alleged savings it had claimed as basis for the lay-offs. The Company did not reply to this.

The National Labor Relations Board concluded that upon unilaterally contracting-out work the Company did not discriminate against the employees or the Union but that such actions were taken for economic or commercial reasons; and that the subcontracts were entered under an expansion program ordered by the Public Service Commission of Puerto Rico. Notwithstanding this fact, the Board ordered that the Company cease to subcontract unilaterally in the future without bargaining with the Union and ordered it to bargain with the Union as to the effects in the contracting unit of the subcontracts made in the past. It decreed that the lay-offs made as a consequence of such unfair practices were illegal and ordered reinstatement with back wages of all such employees laid-off as a result of such unlawful conduct.[2]

The Board affirmatively ordered that the Company furnish the Union all such information and data necessary to prove its claim as well as to discharge its statutory responsibility as bargaining representative of the employees of the Company. Finally the Company was ordered to cease and desist of all such conduct and activity found unlawful by the Board.

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2. The Board stated that the record did not identify specifically the employees that were affected by the subcontracts and that it was possible that the lay-off of some of the 227 employees had no relation with such contracts, leaving the question to be decided in subsequent proceedings in compliance with its decision.

Proceedings Before the Puerto Rico Labor Relations Board.

The hearing on the complaint filed before the Board was held on December 12, 1963. The Trial Examiner found that the Company had incurred in an unfair labor practice in violation of Article 8(1)(f) of the Puerto Rico Labor Relations Act upon violating the Collective Bargaining Agreement—refusing the assistance of the Conciliation Service—and recommended that Puerto Rico Telephone Company be ordered to take the following affirmative action: To meet in Grievance Committee in order to discuss the cases submitted by 43 employees of the Company that alleged to have been laid-off and to permit that an officer of the Conciliation and Arbitration Service of the Labor Department participate in the discussions of the Grievance Committee. The Board entered an order affirming the affirmative action recommended by the Trial Examiner.

It appears from the record that representatives of the Company and of the Union in the Grievance Committee had been considering all the situation that had arisen as a result of the mass lay-offs of employees by the Company because of subcontracting work as well as the matter related to the information.[3] There is in evidence in this case a transcript of the proceedings that took place before the Grievance Committee during the meetings held on the 1st, 2nd and 4th of October 1963. In these meetings the Company assumed an identical position as the one it had assumed during the proceedings before the National Labor Relations Board. It insisted in not discussing the general question of the lay-offs caused by subcontracting. It main-

3. It also appears from the decision of the National Labor Relations Board that such conversations commenced on November 15, 1962 and thereafter continued frequently and periodically during 1963.

tained that the Committee had no authority to enter into this matter in view of the definition of a grievance contained in Article XV—the allegation by an employee of a violation of the contractual provisions of the Agreement—, because subcontracting was a management prerogative under Article IV that did not violate any covenant and, therefore, the Committee had no authority as provided in subparagraph (f) of Section 4 of said Article XV "to alter, amend, modify, add to or subtract from the provisions of" the Agreement.

The Union announced they proposed to consider the grievance of 45 employees laid-off since September 1, 1963, and to that effect requested the Company to furnish the following information:

1. Volume of business of the Telephone Company during the months of November, December of 1962; January, February, March, April, May, June, July, August and September of 1963.

2. Profits obtained by the Company from its volume of business computed on a monthly basis.

3. Amounts saved by the Company representing salaries not paid to laid-off employees.

4. Who are performing the work previously performed by the laid-off personnel.

5. Amount saved by the Company on account thereof.

6. Specific reason for each lay-off clearly indicating the cause.

7. How many subcontracts the Company has entered into since November until present date.

8. Value and expenses incurred by the Company as a result of these subcontracts or, in other words, the cost of the subcontracts.

9. Nature of the work subcontracted.

10. Employees that have commenced to work for

the Company since November 1962 by departments, that is, new employees.

11. Part time employees in the Company, by departments.

12. How many have been pensioned, their ages and names and amount of pension being paid to each.

The Company refused to furnish such information in a general way for the reasons alleged before the National Labor Relations Board and in the Grievance Committee, already stated. It accepted, however, that upon considering the grievances of laid-off employees the issue of the violation of the seniority clause of the Agreement could be involved and it was willing at all times to consider this aspect case by case. It was also willing to furnish the information requested under number 6 upon considering each grievance individually, that is, the specific reason for the lay-off in each specific case, as well as any other relevant information to each individual employee.

Thereupon, the parties agreed to consider each lay-off by separate in the light of the circumstances of each case and the case of one of the employees was considered and the Company furnished information as to the reason for his lay-off. However, further proceedings were not continued because the Union insisted, prior to continuing, to be furnished all the general information of an economic nature that it had requested. The Company was willing to furnish it as it may be found relevant to the case. In view of this, the Grievance Committee was in total disagreement, not as to the merits of the case, but as to how to proceed with the same. The Union then requested the use of the Conciliation Service. The position of the Company was to the effect that inasmuch as there had not been a disagreement as to the merits of the grievances since it had not been considered in its merits, requesting the intervention of the Conciliation

Service was premature. The proceedings before the Grievance Committee of October 1, 2 and 4, 1963 came to an end under such circumstances. The Union then charged the Company a violation of the Agreement before the Puerto Rico Labor Relations Board for refusing to use the Conciliation Service.

The Problem of Jurisdiction.

The foregoing facts unquestionably show that the respective attitude and position of the Company and of the Union in the Grievance Committee during the proceedings of October 1, 2 and 4, 1963 that originated this case are in no way different from the attitude and position assumed by them in the proceedings that took place before the National Labor Relations Board and that the matter in controversy was the same: the policy of the Company regarding subcontracting of work and the inevitable lay-offs on account thereof. The record shows that in the proceedings before the Grievance Committee of October 1, 2 and 4, the Union was not interested in considering the reason for any particular lay-off or the possible violation of the seniority clause as affecting those lay-offs or any other strictly personal reason, so much as considering the general problem involved of the policy pursued by the Company of subcontracting work thereby creating unemployment. This problem, from which the request of information was a logical derivative, already was under consideration by the National Labor Relations Board in all its aspects and consequences, with full jurisdiction assumed by said agency.

In view of the attitude described above of the Union at the October meetings, it is not explained, and the record does not offer any such explanation, why the controversy related to the lay-offs of said 45 employees that the Union itself attributed to the same considerations involved in the

March lay-off—subcontracting—was not taken to the National Labor Relations Board that already had the matter before it and, on the contrary, an attempt was made to submit it to a local Conciliator who under the circumstances very little or nothing effective could do since the matter was sub-judice before that Board thereby inviting to a clash of jurisdiction concerning a company that is fully covered by the Federal legislation. As an illustration of this statement it should be pointed out that presently, after the National Labor Relations Board having decided everything related to the validity of the unilateral subcontracts and its consequences,—the lay-offs—, no practical purpose would be achieved from the affirmative action ordered by the Puerto Rico Labor Relations Board to the effect that the Conciliation Service be used to advise as to a controversy that already has been adjudicated in law. And if a Conciliator were to intervene even with regard to this group of employees in particular, nothing different from what has already been decided by competent authority could be recommended or executed.

Such conflict of jurisdiction was invoked by the Company before the Board. The Trial Examiner commented as follows:

> "It is possible that the argument of the employer will eventually prevail. We have recently stated that the changing rhythm of labor relations in Puerto Rico swiftly approaches the moment in which an inevitable clash will be produced between the exercise of jurisdiction by the National Labor Relations Board and identical activity on the part of Puerto Rico Labor Relations Board."

It is unquestionable that the exercise of authority causes jurisdictional conflicts between the National Labor Relations Board and the State Boards where the same exist, or with State Courts, and even within the Federal jurisdiction

between the National Labor Relations Boards and the District Courts. Such conflicts of jurisdiction will leave a legacy in the future of incalculable judicial gloss in all levels of expression. It is superfluous to cite or analyze decisions on this matter as the same are well known.

Puerto Rico can not escape from this situation. Although special circumstances of its existence and of its economy may perhaps present special considerations with respect to Federal intervention in its labor relations, this problem belongs to the high political spheres that have to do with fixing the federal relations between the United States and Puerto Rico. In the meantime and until such relations are altered or modified by the appropriate political organisms, we do not believe that the clash or struggle for authority between the National Labor Relations Board and the Puerto Rico Labor Relations Board shall always come to being, be a necessity and/or inevitably. It can and should be avoided whenever circumstances indicate that it is not necessary that such clash happens if good judgment is used. It is not advisable either that conflicts occur if the same can be avoided as a result of an undesirable struggle for authority or a duplicity of effort resulting in the superfluous waste of energy and time and in inevitable confusion.

Here, the authority of the National Labor Relations Board over the activities of the Telephone Company, a utility engaged in interstate commerce, was neither debatable nor merely conceivable under the standards of *Garmon*, but was a clear authority free from any doubt in the light of the facts that were involved.[4] Moreover, the National Board did not cede or waive its jurisdiction; on the contrary, it had fully exercised it.

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4. *San Diego Unions* v. *Garmon*, 359 U. S. 236.

See: *Plumbers' Union* v. *Borden*, 373 U. S. 690; *Liner* v. *Jafco Co.*, 376 U. S. 301; *Humphrey* v. *Moore*, 375 U. S. 335; *Guss* v. *Utah Labor Board*, 359 U. S. 1. Cf.: *Carey* v. *Westinghouse Corp.*, 375 U. S. 261; *Smith* v. *Evening News Ass.*, 371 U. S. 195.

We are aware that jurisdiction of the Local Board has been invoked on the basis of a breach of contract. We have already decided, since 1952, in *Puerto Rico Labor Relations Board* v. *I. L. A.*, 73 DPR 616, that inasmuch as a breach of a Bargaining Agreement is not protected pursuant to Federal legislation by the National Labor Relations Board [there is a remedy in the District Courts, Section 301, 61 Stat. 156] while on the other hand it is an unfair labor practice pursuant to our legislation, the Puerto Rico Labor Relations Board has authority to intervene in cases of contract violation even when entities engaged in interstate commerce and covered by the National Labor Relations Act are involved. Any effect of the subsequent decision in *Guss* v. *Utah Labor Board*, 353 U. S. 1, decided in 1957, on our decision in the *I. L. A.* case was neutralized by the subsequent action of Congress upon amending in 1959—Landrum-Griffin Act—Section 14 of the 1947 Taft-Hartley Act. See: *Puerto Rico Telephone Co.* v. *Puerto Rico Labor Relations Board*, revision No. 74, ... DPR ....., decided November 5, 1962, and the statement of jurisdictional standards in *Puerto Rico Labor Relations Board* v. *Milares Realty*, ... DPR, ..., decided September 29, 1964.

The Board strongly invokes our decision of November 5, 1962, cited above. Apart from the facts that what we are now deciding is not in conflict with said decision, there is a clear distinction regarding the effects of the standards that should apply between the facts and the situation involved in Revision No. 74 and those involved herein. In the other case the question involved was the dismissal of one employee that raised purely individual issues. She took her case to the Grievance Committee, then to the Local Board as well as to the National Board. The National Board promptly refused to intervene or to assume jurisdiction. It seems clear that the National Board did not

consider then her dismissal any problem affecting commerce as distinguished to its conclusion regarding the prejudicial effect to commerce in the layoffs in this case. Therefore, the issue of conflict of jurisdiction that the Company presented in Revision No. 74, first before the Local Board and that it then maintained before us, was really unwarranted inasmuch as there was not any conflict of jurisdiction.

Even if it were true that the Local Board had authority under the law to intervene in the presence of a breach of contract for refusal to use the Conciliation Service, the record shows that the alleged violation involved a minor incident that was an inseparable part of the basic problem already under consideration by the National Labor Relations Board. We believe that under such circumstances, even if there was authority, that the best policy should have been for the Local Board to abstain using it in exercise of the discretion with which it is invested as the agency in charge of labor relations."

The Case on Its Merits.

In view of the fact that the Local Board exercised jurisdiction even if it was over a limited or residual aspect within the general problem involved, we now consider the merits of the question in that aspect.

In its Decision and Order the Local Board stated:

> "The employer argues that it was indispensable to determine the propriety of the request made by the Union in the Grievance Committee prior to a determination as to the contract violation charged in this case. In his report the Trial Examiner did not make any finding in this regard. We adopt the position of the Trial Examiner as we consider such determination irrelevant in order to establish the contract violation charged to the Company. The motivations, *merits* or

reasons that the Company had for not complying with the obligation that it assumed upon bargaining with the Union Section 4(c) of Article XV of the Bargaining Agreement are not incumbent on the Board in this case." (Emphasis supplied.)

We believe the Company is correct in its impeachment of the above conclusion. The Company was charged of a contract violation because it refused to use the Conciliation Service that the Union requested. The controversy precisely involved whether the use of said service at the stage it was requested was in order when there was not a disagreement between the parties regarding the merits of the grievance being discussed. Based on its interpretation of Article XV the Company maintained that such intervention was premature. There was also the problem of the interpretation of Section 4(c) of Article XV as to whether or not one of the parties in the Grievance Committee could unilaterally force the other to use said service or if it had to be requested by both parties. It can not be said that the foregoing different criterion of the parties regarding their interpretation of the Agreement were entirely frivolous or without merit. A disagreement having arisen regarding the use of the Conciliation Service it was necessary that either party by arbitration or the Local Board by an interpretation of the Agreement in the light of the facts involved should previously decide that the use of the Conciliation Service was in order at the stage when requested by the Union and that it could be requested by only one of the parties in the Grievance Committee, as a condition precedent of the final conclusion that the Company had violated the Agreement. The error of considering such determinations irrelevant, which was precisely the question in controversy, warrants that the order of the Board be vacated.

We have hereinbefore stated that the disagreement be-

tween the parties as to the furnishing of information has already been decided by the National Labor Relations Board as a right the Union has been granted by Federal Law, irrespective of the Bargaining Agreement. Likewise, the controversy as to the validity of the layoffs due to subcontracting and as to the authority to subcontract work unilaterally has also been decided. As we have pointed out before, the Order of the Local Board that the intervention of a Conciliator to help the parties be permitted would have no practical effect as such differences have been decided. However, it may be the case in connection with the lay-offs involved herein that problems of seniority may be involved or that layoffs due to other reasons may also be involved.[5]

In view of the foregoing circumstances the Decision and Order of the Local Board is vacated with instructions of referring the matter back to the Grievance Committee so that the grievances be considered on their merits on any aspect not already adjudicated, and if there is a disagreement with respect to the use of the Conciliation Service on any matter not decided. The same preferably to be submitted to arbitration because involving an interpretation of the Agreement. Judgment shall be entered in accordance with the above.

/s/ CARLOS SANTANA BECERRA,
Associate Justice.

5. Similar to the record before the National Labor Relations Board, the record before us does not allow to determine that all the lay-offs were due to subcontracting.

Translation

IN THE SUPREME COURT OF PUERTO RICO.

Puerto Rico Telephone Company, *Petitioner*, *vs.* Puerto Rico Labor Relations Board and Unión de Empleados de la Industria del Teléfono de Puerto Rico, etc., *Defendants.*	P. R. L. R. B. 64-5 Revision

Chamber composed of its President, Associate Justice Mr. Belaval, and of Associate Justices Messrs. Hernández Matos and Santana Becerra.

JUDGMENT.

San Juan, Puerto Rico, April 13, 1965

On the grounds of the foregoing Opinion, the Decision and Order of the Puerto Rico Labor Relations Board of May 13, 1964 is hereby vacated and the case is returned to be proceeded with as ordered in said Opinion.

It is so pronounced and ordered by the Court and in witness whereof signed by its Acting Chief Justice.

/s/ PEDRO PÉREZ PIMENTEL
Acting Chief Justice

Certified to:

/s/ IGNACIO RIVERA
Clerk.

APPENDIX F.

PUERTO RICO TELEPHONE COMPANY, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 6460.

UNITED STATES COURT OF APPEALS

First Circuit.

Heard Feb. 8, 1966.

Decided April 27, 1966.

McENTEE, *Circuit Judge.*

This National Labor Relations Act case comes to us on the petition of the Puerto Rico Telephone Company to set aside and on the cross-petition of the National Labor Relations Board to enforce an unfair labor practice order[1] issued by the Board against the company. The order is based upon the Board's findings[2] that the company violated Section 8(a)(5) and (1) of the Act[3] by unilaterally sub-

1. The Board's decision and order issued on November 20, 1964, are reported at 149 NLRB No. 84.

2. This case was heard originally by a trial examiner as provided in the Act. Upon review of the record of that proceeding the Board adopted the findings, conclusions and recommendations of the trial examiner.

3. "Sec. 8 (a) [i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisons of section 9(a)."

contracting work performed by its employees in the bargaining unit without first giving the union[4] notice and an opportunity to bargain with respect thereof; and also by refusing to furnish the union with relevant information as to the cause of layoffs of unit employees.

During the period involved in this case the company was engaged in a large scale modernization and expansion program mandated by the Puerto Rico Public Service Commission.[5] This program, which began in 1958 and was enlarged in 1961, included, among other things, the removal and replacing of old telephones with dial sets, filling a large number of back orders for new phones; modernizing and expanding central exchanges and long distance circuits, and the installation and addition of cables. The entire project involved an expenditure of 130 million dollars with completion required by 1964.

It was evident from the start that the company could not possibly carry out this program with its regular work force. Accordingly, the company decided to subcontract[6] and did subcontract a substantial amount of the work. It is undisputed that the company's decision to subcontract was motivated by business considerations. No antiunion animus was involved in this decision, but at no time did the company give the union prior notice or an opportunity

4. Sindicato de Trabajadores Packinghouse, United Packinghouse Food & Allied Workers, District 9 of Puerto Rico, AFL-CIO, and its affiliate, Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963.

5. In this connection the Commission stated: "* * * we are arranging for continuous supervision, to the extent allowed us by law, over the expansion and improvement program we are ordering the Puerto Rico Telephone Company to carry out, so that we may be sure that it will develop as planned."

6. It is undisputed that the practice of subcontracting is not uncommon in the telephone industry and there is evidence that in the past this company had engaged subcontractors to augment its own work force.

to bargain with reference to any of these subcontracts. Most of these subcontracts involved removal and installation of telephones and the distribution and splicing of cable. There is evidence that the company could not have used its own employees exclusively on the program since it needed them to continue providing service at the same time the expansion program was in operation. Furthermore, this program frequently required the services of highly skilled technicians which it would have taken a considerable time to train.

In May of 1959 the company and the union entered into their first collective bargaining agreement which was effective through May 6, 1962. There was no clause in this agreement covering subcontracting. Negotiations for a new agreement began in October of 1961. At that time a number of subcontracts had been let and the company's subcontracting policy was causing the union serious concern. The union informed the company that it regarded the subcontracting as "a threat to employment." During this period of negotiations, which resulted in the signing of a new agreement on November 8, 1962, the union made repeated demands for the inclusion of a clause limiting subcontracting.[7] The company resisted these demands on the grounds that subcontracting was its exclusive prerogative and that the use of subcontractors was necessary for the completion of its program. Also, there is evidence that during these negotiations the company assured the union that no unit employees would be laid off because of the company's subcontracting activities. Despite the negotiations, the parties could not agree on this issue and the upshot of the matter was that no subcontracting clause of any kind was included in the November 8 agreement.

7. The record shows that subcontracting was a major issue in the more than thirty bargaining sessions of the parties preceding the execution of the agreement.

We now reach the crucial period in this case. On November 9, the day after the execution of the new agreement, the company started laying off employees. This continued through March 31, 1963, during which period some 227 unit employees, 41 management employees and 37 temporary employees, were laid off. The employees were told that the layoffs were due to a reorganization of the company. In the course of the next few months the parties had numerous meetings with reference to the layoffs. The union attributed them to the subcontracting. The company denied this and claimed that these layoffs were entirely the result of the "economic reorganization" of the company. It pointed out that the expansion program had reached its peak in mid 1962 and was tapering off; that a recent survey showed the company was greatly overstaffed and that a decision had been made earlier in 1962 to reduce its personnel over a period of time. Also, there was evidence that this "economic reorganization" was motivated, at least in part, by the refusal of the Public Service Commission in June of 1962 to grant a temporary rate increase to the company.

In March of 1963, the parties agreed that the dispute concerning the layoffs would be submitted to the grievance committee established under the November 8 agreement. At the March 14 meeting of this committee the union asked the company to submit data[8] that would prove to the com-

8. The data requested was as follows:

"1. Volume of business during the months of January, February and March 1963 compared with November 1962 when the contract was signed.

2. Earnings derived by the company from its volume of business.

3. Amounts saved by the company on account of wages of those laid off.

4. Is someone performing the labor that the laid off personnel performed?

5. How much will the company save?"

mittee that the layoffs were due to "economic reorganization" as claimed. The company rejected this request. The union took the position that since it had been denied the requested information, there was no point in continuing the discussions. It then proposed that the matter be submitted to arbitration but the company would not agree.

This brings us to the issue of whether there is substantial evidence to support the Board's finding that the company violated the Act by refusing to furnish this information. To be sure, an employer is not required to furnish all the information the union thinks might be helpful in processing grievances. However, an employer violates Section 8(a)(5) and (1) of the Act by refusing during the term of a collective bargaining agreement, to furnish information requested by the union if such information is *relevant* to a grievance or to the administration or policing of the agreement. Curtiss-Wright Corp., Wright Aero. Div. v. NLRB, 347 F. 2d 61, 65 (3d Cir. 1965). As stated in that case at p. 69: "Once relevance is determined, an employer's refusal to honor a request is a per se violation of the Act." The company contends that the requested information was irrelevant. We do not agree with this contention. The information requested by the union was relevant in evaluating the pending grievances. The company claimed the layoffs were for economic reasons. The union merely wanted the company to prove that such economic reasons existed. Clearly the data concerning volume of business, earnings, wage savings due to layoffs, etc., became relevant once the company raised the economic issue as the reason for the layoffs. Whether or not the company must furnish the information requested here cannot be separated from the overriding issue of whether or not unilateral subcontracting of the Fibreboard type was taking place as will hereinafter be discussed. But with the requested information in hand the union certainly would be

better equipped to fulfill its obligations under Section 8(d) of the Act to administer the collective bargaining agreement.

We are satisfied there is substantial evidence in the record when viewed as a whole to support the Board's finding that such information was relevant and, therefore, should have been furnished. Curtiss-Wright Corp., Wright Aero. Div. v. NLRB, supra; J. I. Case Company v. NLRB, 253 F. 2d 149 (7th Cir. 1958); NLRB v. F. W. Woolworth Co., 352 U. S. 938, 77 S. Ct. 261, 1 L. Ed. 2d 235, reversing 235 F. 2d 319 (9th Cir. 1956); Timken Roller Bearing Company v. NLRB, 325 F. 2d 746 (6th Cir. 1963), cert. denied, 376 U. S. 971; 84 S. Ct. 1135, 12 L. Ed. 2d 85 (1964).

We come now to the question of whether the record supports the Board's finding that the company's subcontracting activities violated Section 8(a) (5) and (1) of the Act. In support of its finding, the Board relied upon the principles announced in Fibreboard Corp. v. NLRB, 379 U. S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964). In that case the employer for reasons of economy, replaced its *entire* maintenance crew in the bargaining unit with the services of a subcontractor without first giving the union notice and an opportunity to bargain. In holding that the employer's conduct violated Section 8(a) (5) of the Act, the Supreme Court said that this type of contracting out is covered by the phrase "terms and conditions of employment" within the meaning of Section 8(d) and is a mandatory subject of collective bargaining under that section.

The Court recognized, however, that to require an employer to bargain about all subcontracting could cause undesirable interference with the management of its business and emphasized the restricted scope of its holding. One limitation strongly implicit in Fibreboard, see 379 U. S. at 212, 215, 85 S. Ct. 398, and explicit in recent de-

cisions of the Board itself, e.g., Westinghouse Electric Corp., 150 NLRB No. 136 (1965), is that, at least when the subcontracting is designed to meet some temporary or transient need rather than to alter permanently the basic structure of the enterprise, an employer is not obligated to bargain unless the subcontracting adversely affects the unit's present employees. The reason for this is evident. Subcontracting like many other managerial decisions, may often touch the "terms and conditions of employment" only remotely, if at all. An employer should not be required to bargain about such subcontracting any more than he is required to bargain about these other matters which have been held to be outside the scope of mandatory negotiation. See, e.g., Sylvania Electric Products, Inc. v. NLRB, 291 F. 2d 128 (1st Cir. 1961), cert. denied, 368 U. S. 926, 82 S. Ct. 360, 7 L. Ed. 2d 190. Thus, a necessary condition to requiring an employer to bargain before entering into a subcontract is that the subcontract have an immediate adverse effect upon the bargaining unit.

Some forty-five subcontracts were in force during the period covered by the complaint. The Board relies on seven of them[9] to prove the unfair labor practices charged.

9. These seven are as follows:

Contract between the company and ITT Puerto Rico for installation of stations in San Juan, dated May 15, 1962.

Contract between the company and ITT Puerto Rico for installation of PBX and PABX switchboards, dated May 15, 1962.

Contract between the company and United Communications Co. for installation of stations in San Juan, dated May 24, 1962.

Contract between the company and Henkels & McCoy Co. for installation of cable, dated June 27, 1962.

Letter relating to contract between the company and ITT Puerto Rico for performance of a "Test Job" in the company's central offices, dated August 30, 1962.

Contract between the company and ITT Puerto Rico for distribution of cable No. 46 in the Santurce area, dated February 4, 1963.

Contract between the company and ITT Puerto Rico for station installations, dated February 14, 1963.

Of this number only the subcontracts of February 4 and 14, 1963, were executed within the statutory period.[10] Although the remaining subcontracts may have been admissible as background evidence, it seems to us that the subcontracts relied upon to establish the substantive unfair labor practice charges themselves must be executed within the six months statutory period. Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. NLRB, 362 U. S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960), otherwise they are barred by the proviso of § 10(b). Consequently, the Board's case here must stand or fall on the two February 1963 subcontracts. We think there is a total failure of evidence that these two subcontracts adversely affected the bargaining unit.

The February 4 subcontract involved the distribution of a large underground and aerial feeder cable. The actual laying of this cable was done by the regular company employees. The work that was subcontracted involved only splicing which requires skilled workmanship. The job was subcontracted only because the company did not have enough splicers of its own to do the work. There is no evidence that any splicer employed by the company was replaced as a result of this subcontract. Although there is evidence that some sixteen splicers of various classes were laid off some time during the complaint period, the number of splicers employed by the company actually increased during this period.

The February 14 subcontract pertained to the removal of all old telephones in certain areas of Puerto Rico. It involved the replacement of some 38,000-50,000 telephones over a six months period. There was uncontradicted evi-

10. Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. The union's charge was filed on March 8, 1963.

dence that while this was being done company employees were doing their normal work and no company employees were laid off as a result of this subcontract. Although installers were dismissed during the period covered by the complaint, the total number of installers increased during this period.

In short, we cannot say there is substantial evidence in the record, taken as a whole, from which it may reasonably be inferred that the bargaining unit or any employee in it suffered a significant detriment or was otherwise adversely affected as a direct result of these two subcontracts. We, therefore, conclude that the company's subcontracting activities did not violate Section 8(a) (5) and (1) of the Act.

A decree will be entered enforcing only that part of the order which relates to the refusal of the petitioner to furnish the union with relevant information respecting the cause of the layoffs of unit employees.

APPENDIX G.

STATUTES OF LIMITATIONS (BY YEARS)

	Jurisdiction	Tort*	Written Contract	Unwritten Contract
1.	Alabama	1	6	6
2.	Alaska	2	6	6
3.	Arizona	2	6	3
4.	Arkansas	3	5	3
5.	California	1	4	2
6.	Colorado	6	6	6
7.	Connecticut	3	6	3
8.	Delaware	2	3	3
9.	Dist. of Columbia	3	3	3
10.	Florida	4	5	3
11.	Georgia	2	6	4
12.	Hawaii	2	6	6
13.	Idaho	2	5	4
14.	Illinois	2	10	5
15.	Indiana	2	20	6
16.	Iowa	2	10	5
17.	Kansas	2	5	3
18.	Kentucky	1	15	5
19.	Louisiana	1	10	10
20.	Maine	6	20	6
21.	Maryland	3	3	3
22.	Massachusetts	2	20	6
23.	Michigan	3	6	6
24.	Minnesota	2	6	6
25.	Mississippi	6	6	3
26.	Missouri	5	10	5
27.	Montana	3	8	5
28.	Nebraska	4	5	4

* Not every jurisdiction covered has a tort category, and so the closest parallel category was used.

	Jurisdiction	Tort*	Written Contract	Unwritten Contract
29.	Nevada	2	6	4
30.	New Hampshire	2	6	6
31.	New Jersey	2	6	6
32.	New Mexico	3	6	5
33.	New York	3	6	6
34.	North Carolina	3	3	3
35.	North Dakota	6	6	6
36.	Ohio	2	15	6
37.	Oklahoma	2	5	3
38.	Oregon	2	6	6
39.	Pennsylvania	2	6	6
40.	Puerto Rico	1	15	15
41.	Rhode Island	2	6	6
42.	South Carolina	6	6	6
43.	South Dakota	6	6	6
44.	Tennessee	1	6	6
45.	Texas	2	4	2
46.	Utah	4	6	4
47.	Vermont	3	6	6
48.	Virginia	2	5	3
49.	Virgin Islands	2	6	6
50.	Washington	2	6	3
51.	West Virginia	2	10	5
52.	Wisconsin	3	6	6
53.	Wyoming	4	10	8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 385

PUERTO RICO TELEPHONE COMPANY,
Petitioner,

vs.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

PUERTO RICO TELEPHONE COMPANY,

Petitioner,

vs.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Puerto Rico Telephone Company, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the First Circuit entered in this case on April 17, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals, entered April 17, 1970, printed in Appendix A, has not, as yet, been officially reported. The opinion of District Court for Puerto Rico, entered August 8, 1969, printed in Appendix B, is reported at 302 F. Supp. 224 (D. P. R. 1969).

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did a Union breach its duty of fair representation by failing to process grievances through the contractual grievance procedure, even though it pursued numerous alternative avenues of redress and, as was found by the Court of Appeals below, the Union was at no time motivated by hostility, bad faith, discrimination or dishonesty?

2. Even assuming a Union has breached its duty of fair representation, in the absence of hostility, by failing to process grievances protesting employee discharges, what is the appropriate remedy where, as was found by the Court of Appeals below, the Employer did not frustrate the grievance procedure and the question of contractual violation is a "close one?"

3. What is the appropriate statute of limitations in a § 301 suit where both breach of the Union's duty of fair representation and breach by the Employer of the collective bargaining contract must be proven?

STATUTES INVOLVED.

The statutes involved in this case, printed in pertinent part in Appendix C, are Sections 203(d), 301(a), and 10(b) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 173(d), 185(a), 160(b), and three Puerto Rican statutes, 31 LPRA §§ 5141, 5298, 5294.

STATEMENT OF THE CASE.

The Case in a Nutshell.

Union leader Armando Sanchez was vitally interested in saving the jobs of all his members who were employed by Puerto Rico Telephone Company. The Company employed many of Sanchez' members. In fact, it employed too many. Faced with a mammoth task of expansion requiring the services of numerous subcontractors and, at the same time horribly overstaffed, the Company evaluated employee performance and determined which employees to retain and which to let go. The Company stood willing to process all grievances through the contractual grievance procedure.

Faced with hundreds of employee terminations, Sanchez and his Union first used the grievance procedure to obtain reinstatement of all, but were hampered by its weak provisions; and they realized that, even if successful under the seniority article, the result would not be reinstatement of all, but only substitution of junior employees for senior employees who had been terminated. Sanchez turned to the Puerto Rico Department of Labor and to the Puerto Rico Senate Labor Committee without success. The Union twice resorted to the Puerto Rico Labor Relations Board. Both cases were appealed to the Puerto Rico Supreme Court which declared that the processes of the National Labor Relations Board, and the charges that the Union had also

filed with that agency, were the Union's best hope. Indeed, that is also what Sanchez' lawyers told him, and he nurtured his Union's case with success through the Trial Examiner's decision and the Board, only to meet failure before the Court of Appeals. In taking these actions, Sanchez was supported, in fact encouraged, by the Plaintiffs in this case.

Following a § 301 suit brought by Plaintiffs, several of the discharged employees, the First Circuit found that the Union's efforts were, indeed, undertaken in good faith and without hostility, but because of the Union's failure to use the grievance procedure it did not fulfill its duty to fairly represent six of them.

As to these six, it was a jury, and not an arbitrator, which found, in what the Court of Appeals characterized as a "close" case, that the Company breached the seniority article of the contract by discharging them and retaining less senior employees.

The First Circuit also found that a one-year tort statute of limitations immunized the Union from liability, and it shifted the entire liability to the Company, though damages were previously allocated by the jury between the Company and the Union.

The Court of Appeals reached this result even though it admitted that the Company had done nothing to frustrate the grievance procedure, and conceded that even if the Union had processed these grievances, Plaintiffs would likely have ended up with nothing.

The Case in Detail.

In late 1958, the Puerto Rico Telephone Company commenced a major reorganization and modernization program mandated by the Puerto Rico Public Service Com-

mission (JA 316).[1] Since the Company could not possibly carry out this program in the allotted time with its regular work force, it employed numerous subcontractors (359 F. 2d at 985). During this program, a manpower study indicated that the Company was "horribly overstaffed,"[2] (149 NLRB at 956), and given the refusal of the Public Service Commission in June 1962, to grant a rate increase, the Company concluded that a personnel reduction was necessary (359 F. 2d at 986).

The dismissals began on November 9, 1962, and by March 3, 1963, the Company had terminated 227 employees (JA 318). During this period, the Union[3] initiated grievance discussions with the Company (JA 251), charging that the subcontracting was eliminating employees (149 NLRB at 956-957) and demanding their reinstatement (JA 181). As a result, some employees were reinstated, but were subsequently released during later rounds of dismissals (JA 181).

Union President Armando Sanchez followed up the grievance discussions with direct communications to the Company president and the Governor of Puerto Rico (JA 181-182, 328), by personally going to the Puerto Rico

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* The abbreviation "JA" refers to the Joint Appendix, which was filed with the Court of Appeals and which is a part of the certified record in this case.

1. *Puerto Rico Telephone Co.*, 149 NLRB 950, 952-956 (1964), enforced in part, set aside in part, *Puerto Rico Telephone Co.* v. *NLRB*, 359 F. 2d 983 (1st Cir. 1966).

2. Compared to the Bell System and General Telephone, the Puerto Rico Telephone Company employed three times as many employees per thousand stations (149 NLRB at 956 n. 18).

3. The Company's employees were represented by Sindicato de Trabajadores Packinghouse, United Packinghouse, Food & Allied Workers District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963 (hereinafter referred to as the "Union"), which was also a Defendant in the case below.

Department of Labor and requesting the intervention of the Secretary of Labor (JA 185) and by taking the dispute to the Puerto Rico Senate Labor Committee, which undertook an investigation of the matter (JA 185-186).

In March 1963, further grievance meetings were held, but resulted in impasse (149 NLRB at 958-959). The Union then filed charges against the Company with the National Labor Relations Board[4] on March 8, 1963, and submitted amended charges on March 20 and August 15 of that same year, contesting, *inter alia*, the Company's subcontracting and its simultaneous mass dismissal of employees (149 NLRB at 951). On August 15, 1963, the Board's General Counsel issued a complaint, charging the Company with violations of §§ 8(a)(3) and (1) of the National Labor Relations Act, as amended (hereinafter referred to as NLRA) (149 NLRB at 951).

In October 1963, following dismissal of 43 more employees,[5] the Union once again called for resumption of grievance committee meetings (JA 207-209). After three days of discussion, these proceedings ended in impasse, with the questions of the dismissals, and the propriety of intervention by a conciliator unresolved (JA 209, 337-338, 349-350).

A few days later, the Union filed a charge with the Puerto Rico Labor Board, alleging the Company had violated the collective bargaining agreement and, subsequently, on November 20, 1963, a complaint against the Company was issued by the Insular Board (JA 339-340).

4. The Union also turned to the Puerto Rico Labor Relations Board to undertake contempt proceedings against the Company for violation of a 1960 decree enjoining violations of the collective bargaining agreement (149 NLRB at 959). Such a motion was filed with the Court, but was denied on May 10, 1963, and on reconsideration the Court adhered to this ruling (149 NLRB at 959).

5. Among the 43 was Plaintiff Elsie Lugo Bernier (JA 208).

During this time, hearings were held before an NLRB Trial Examiner, culminating in a Decision on February 3, 1964, which was adopted by the NLRB on November 20, 1964 (149 NLRB 950; see Appendix D for full text). The Trial Examiner found that the Company violated Sections 8(a)(5) and (1) of the NLRA by its subcontracting and by its failure to furnish the Union with certain requested information (149 NLRB at 969). Reinstatement of all employees laid off "as a result of [the Company's] unlawful action" and the furnishing of the requested information were ordered (149 NLRB at 969-970). The Trial Examiner determined that the question of which specific employees were unlawfully terminated would be decided in subsequent compliance proceedings (149 NLRB at 968).

In the Insular Labor Board proceedings, a hearing was held on December 12, 1963, after which a trial examiner, subsequently affirmed by the full Board, found the Company had violated Article 8(1)(f) of the Puerto Rico Labor Relations Act by refusing assistance of the conciliation service at grievance meetings (JA 348). This decision was appealed to the Supreme Court of Puerto Rico, which, in its decision rendered April 13, 1965, (see Appendix E for full text), acknowledged the nature and status of the NLRB proceedings which had, at that stage, culminated in a broad remedial order. The Court held:

> "Even if it were true that the Local Board had authority under the law to intervene in the presence of a breach of contract for refusal to use the Conciliation Service, the record shows that *the alleged violation involved a minor incident that was an inseparable part of the basic problem already under consideration by the National Labor Relations Board.* We believe that under such circumstances, even if there was authority, that the best policy should have been for the Local Board to abstain using it in exer-

cise of the discretion with which it is invested as the agency in charge of labor relations." (JA 355.) (Emphasis added.)

The Order of the NLRB was appealed to the Court of Appeals for the First Circuit, which, on April 27, 1966, entered a decree enforcing only that part of the Board's order relating to the Company's refusal to furnish the Union with information (359 F. 2d 983, 988; see Appendix F for full text).[6]

Plaintiffs in this case are seven[7] former telephone operators at the Company's Mayaguez installation. Six were dismissed on April 3, 1964 (JA 41, 56, 64, 73, 80). Elsie Lugo Bernier was dismissed several months earlier, on September 19, 1963 (JA 50). All seven received form letters, identical to those given hundreds of other discharged employees, explaining that their dismissals were "due to a reorganization" (JA 169, 193, 335).

After receiving notice of termination, two of the Plaintiffs ultimately contacted Sanchez (JA 58, 64, 75). Both received similar responses from Sanchez, who referred to the favorable NLRB Trial Examiner's decision and his belief that they would be better protected by the Board's processes than by any other means and that it would be best to await the final outcome of that proceeding (JA 58, 64-65, 67-68, 195).

This decision to rely on NLRB processes was made by Sanchez with several factors in mind. First, it was made in accord with the advice of counsel (JA 187), which was but-

6. Such information was later supplied by the Company. (JA 35-36).

7. Of the original eleven plaintiffs, the cases of two—Iris Torres de Hernandez and Benjamin Torres Rivera—were dismissed by the District Court for lack of jurisdiction, and two others—Jose A. Franqui and Alfredo Moreu Irizarry—had directed verdicts entered against them by the District Court (302 F. Supp. at 226).

tressed by the Trial Examiner's finding that the Company's subcontracting had a "profound impact on the unit work and the unit employees" and his simultaneous rejection of the Company's contention that there were reasons, other than subcontracting, for the dismissals[8] (149 NLRB at 962). Second, the Union's consistent position was to try to get all employees reinstated and reliance on the seniority provisions of the contract, even if successful, would merely have substituted junior employees for senior ones among the discharged (JA 189). Third, Sanchez had little success utilizing the grievance procedure and what success he did have, with the reinstatement of several employees, was short lived when these employees were subsequently discharged (JA 181). Fourth, Sanchez, who negotiated the contract with the Company (JA 126), believed that its seniority provisions were not strong (JA 183), and knew from prior experience that the grievance procedure presented a long and arduous course for redress (JA 189). In sum, Sanchez believed that given the favorable Trial Examiner's decision and its broad remedial order, the Board's processes were his Union's best hope, a conclusion shared not only by his attorneys but also by no less an authority than the Supreme Court of Puerto Rico (JA 339-357).

Indeed, Plaintiffs seemed to share that same conclusion. There is no evidence in the record that any Plaintiff ever differed with Sanchez' view and requested that a grievance be processed. On the contrary, Jose Arroyo, Rosa Figueroa's husband, met with Sanchez, as a representative of the dismissed telephone operators (JA 201, 205) and discussed the litigation before the NLRB (JA

8. The Trial Examiner noted, 149 NLRB at 962 n. 37:

"Respondent did not adduce evidence supporting Neff's conclusionary testimony concerning the 'overstaffing.' There is no evidence that the particular laid-off employees worked in an 'overstaffed' department or unit—evidence peculiarly within Respondent's possession."

194-195). Sanchez, in response to a question, stated his belief that all of the cases were similar in that they were part of a mass dismissal campaign undertaken by the Company" (JA 194). Arroyo agreed and later communicated in February and March 1965, with both Union counsel and Union President Sanchez with a request that the claim of his wife and others "be included in the claim against the Puerto Rico Telephone Company." (JA 195-198).

Plaintiffs, in a complaint[9] filed on November 22, 1965 (as amended August 11, 1966), alleged that the Union had breached its duty of fair representation by failing to prosecute their grievances and that the Company had wrongfully dismissed them contrary to the seniority provisions of the collective bargaining agreement and prayed for the processing of such grievances and for damages (JA 6-11). Both Defendants denied the allegations and countered that the appropriate remedy, in any event, was resort to the grievance procedure (JA 12-32, 40).

Separate jury trials were held. The first jury found, on evidence characterized by the Court of Appeals as "admittedly not so specific or precise as we should like," that the Company's dismissal of Plaintiffs had violated the seniority provisions of the contract and that Plaintiffs had properly submitted their claims to the Union. The second jury was asked to decide whether or not the Union had breached its duty of fair representation. The jury was first told by the Court that "each Plaintiff had a just grievance against the Company" (JA 242) and then was instructed (JA 245):

> "[The Contract] provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with [contractual grievance procedures].

9. Jurisdiction against the Company was based on § 301(a) of the National Labor Relations Act, as amended, 29 U. S. C. § 185(a), and based against the Union on 28 U. S. C. §§ 1331, 1337.

"... the Union is not required to submit to the Company all grievances of its members relating to layoffs. *It is only required to submit such of those grievances which it regards as just grievances.*" (Emphasis added.)

Numerous instructions offered by both the Union and the Company dealing in detail with the issue of the Union's duty of fair representation were rejected (JA 227-235, 239, 241).

The second jury found that the Union had breached its duty of fair representation and awarded Plaintiffs varying amounts for damages, allocated between the Company and the Union. Post-trial motions by both Defendants were denied (302 F. Supp. at 233).

The Court of Appeals for the First Circuit found that while there was no evidence of hostility, and, in fact, specific evidence to the contrary, the Union breached its duty of fair representation toward six Plaintiffs by its "arbitrary and perfunctory handling of ... apparently meritorious grievance(s)." Plaintiff Elsie Lugo Bernier's claim was dismissed by the Court on the ground "that the Union pressed her grievance to impasse immediately after her dismissal in September 1963."

The Court also found that the cause of action against the Union was barred by Puerto Rico's one-year statute of limitations for tort claims and that, in any event, damages against the Union were inappropriate since "there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date. ..." It held, however, that the action against the Company was subject to Puerto Rico's 15-year statute of limitations for contract claims and that the Company was liable for all the damages previously allocated by the jury.

As for the breach of contract by the Company, although

the Court found the case to be "a close one," and, in fact, unsupported by evidence in regard to Rosa Figueroa, it found that there was "more than a scintilla" to support the jury verdict vis-a-vis the other five Plaintiffs. The Court concluded by noting that it could "find no substantial evidence that the Company could be said to have frustrated the grievance procedure with regard to plaintiffs still before us."

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals as to What Constitutes a Breach of a Union's Duty of Fair Representation Conflicts With Decisions of This Court and Other Courts of Appeals.

The Court of Appeals in this case found a complete absence of hostile motivation by the Union. The Court noted:

> ". . . [W]e can rule out any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials in failing to press plaintiffs' grievances. Mr. Sanchez—the Union official who was responsible for the Union's action in this case—appears from the record as a dedicated Union leader and legislator of manifold responsibilities. . . ."

In spite of this, the First Circuit ruled that the Union violated its duty of fair representation by its "arbitrary and perfunctory handling . . . of apparently meritorious grievance(s). . . ." This holding conflicts with Court of Appeals decisions in the Third, Sixth and Ninth Circuits, numerous District Court and State Court decisions, NLRB cases, as well as rulings of this Court, that have held that only where hostility, bad faith or discrimination are shown does a Union breach its duty of fair representation.

Inexplicably, the First Circuit itself initially seemed to recognize that this Court required a showing of hostility as the *sine qua non* for breach:

> "*[T]he employee must prove arbitrary or bad faith conduct—variously referred to as the absence of honest purpose and judgment and or the presence of hostility or discrimination—on the part of the union in order to prove that it has breached its duty. Vaca v. Sipes,*

supra at 190, 193; *Humphrey* v. *Moore*, 375 U. S. 335, 349-350 (1964); *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337-338 (1953)."

Such was the holding of this Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944), where the duty of fair representation first arose. There, this Court held, 323 U. S. at 204:

> "While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

This holding was reiterated in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953), where this Court said:

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

And it was repeated again in *Humphrey* v. *Moore*, 375 U. S. 335, 342 (1964):

> "The exclusive agent's obligation 'to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any. * * *' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 337-338, 73 S. Ct. 681, 686, 97 L. Ed. 1048."

Various Courts of Appeals have held similarly. Directly on point is a decision of the Sixth Circuit, *St. Clair* v. *Local Union No. 515, International Brotherhood of Teamsters*, 422 F. 2d 128 (6th Cir. 1969). There, a Union's business

agent did little more than phone the Employer twice to protest the discharge of an employee. The employee claimed that the Union did not prosecute his grievance vigorously enough and brought a fair representation suit against the Union. The Sixth Circuit emphasized that the crucial question in a fair representation suit is the presence of bad faith and reversed the District Court's refusal to allow the Union to introduce certain evidence bearing on this issue. In so ruling, the Court held, 422 F. 2d at 131-132:

> "The relevant issue here is not whether the union acted incorrectly, but whether it acted in bad faith. *Vaca* v. *Sipes*, 386 U. S. 171, 192-194, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In determining bad faith, the jury must look through the eyes of the union and see whether there appeared to be reasons upon which the union in good faith relied not to prosecute St. Clair's grievance to the fullest extent."

This holding echoed a prior decision of the Sixth Circuit in *Bialowski* v. *International Union, UAW*, 372 F. 2d 829, 835 (6th Cir. 1967) that:

> "'. . . plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.'"

Accord, *Gray* v. *International Assoc. of Heat & Frost Insulators & Abestos Workers, Local No. 51*, 416 F. 2d 313 (6th Cir. 1969); *Sweeney* v. *Hiltebrant*, 373 F. 2d 491 (6th Cir. 1967).

The First Circuit decision is also at odds with holdings of the Third Circuit. Thus, in *Brady* v. *Trans World Airlines Inc.*, 401 F. 2d 87, 94 (3rd Cir. 1968), *cert. denied*, 394 U. S. 955 (1969), the Court held:

> ". . . it is now recognized that the statutory power

> conferred on unions imposes on them a corresponding duty which encompasses the prohibition of all forms of hostile discrimination."

Accord: *Nedd* v. *United Mine Workers of America*, 400 F. 2d 103, 105 (3rd Cir. 1968).

District Court cases also run counter to the First Circuit's decision. In *Brown* v. *Truck Drivers & Helpers Union No. 355*, 292 F. Supp. 125, 129 (D. Md. 1968), *aff'd.*, 416 F. 2d 1333 (4th Cir. 1969), it was held:

> "It is clear that in the absence of evidence of unfairness or dishonesty union procedures and policies are not subject to judicial attack."

Similarly, in *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F. Supp. 292, 303 (E. D. Pa. 1967), *aff'd.*, 406 F. 2d 744 (3rd Cir. 1968), *cert. denied*, 394 U. S. 998 (1969), the Court noted that in a fair representation suit:

> "The issue is bad faith, not a mistake in judgment and not negligence."

And, in *Turley* v. *Hall's Motor Transit Co.*, 296 F. Supp. 1183, 1187 (M. D. Pa. 1969), the Court ruled:

> "Lack of good faith, improper motive or hostile discrimination are essential elements to be alleged in an action, under Section 301, by a member against his union."

The National Labor Relations Board, which under *Vaca* v. *Sipes*, 386 U. S. 171 (1967), has concurrent jurisdiction over fair representation cases, has likewise indicated that in such cases hostility is an essential prerequisite:

> "[The union] cannot be held to a standard of infallibility; [it] can be expected only to exercise honest judgment." *Local 485, I. U. E.*, 170 NLRB No. 121, TXD 18 (1968).

The highest courts of several states have also, contrary to the First Circuit, ruled that breach of a union's duty of fair representation occurs only when bad faith or hostility is shown. *See, e.g., Phalen* v. *Theatrical Protective Union No. 1*, 22 N. Y. 2d 34, 238 N. E. 2d 295, *cert. denied*, 393 U. S. 1000 (1968); *Ball* v. *Eastern Coal Corp.*, 415 S. W. 2d 620 (Ky. Ct. App. 1967).

Additionally, the First Circuit decision is in conflict with Ninth Circuit cases. Specifically, in *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 182, 186 (9th Cir.) *cert. denied*, 371 U. S. 920 (1962), cited with approval by this Court in *Vaca* v. *Sipes*, 386 U. S. 171, 186 n. 11 (1967), the Ninth Circuit held:

> "The complaint herein alleged that [the Union's action] was 'arbitrary,' 'capricious' and 'unreasonable.' In *Colbert* v. *Brotherhood of Railway Trainmen* . . . this Court held that similar conclusory words ('arbitrary' capricious' and 'fraudulent') without a concomitant showing of lack of good faith did not set forth a claim."

Accord, Seay v. *McDonnell Douglas Corp.*, Docket No. 23,114, 120 Daily Labor Report D-1, D-2 (June 3, 1970) (9th Cir.)

Vaca, of course, noted that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion," 386 U. S. at 191; and it is this phrase alone that the First Circuit relied upon to devise a novel basis for establishing breach of duty of fair representation. It is submitted that the First Circuit's utilization of this single isolated phrase as the foundation for a finding of breach of that duty in the face of admitted good faith motivation constitutes an unwarranted distortion of the principles repeatedly enunciated by this Court.

There are, we submit, several possible bases for interpreting the phrase in question. First, it can be sug-

gested that by referring to arbitrary or perfunctory handling of employee complaints, this Court merely intended to enumerate typical manifestations of bad faith motivation.[10] Going one step further, it can be argued this Court was suggesting that, given evidence of arbitrary or perfunctory handling of complaints, it would be permissible for the trier of fact to infer bad faith motivation, absent evidence to the contrary. Either of these interpretations would, of course, preserve bad faith as an essential prerequisite to a finding of breach of duty of fair representation, and, given the specific finding of good faith in the instant case, the claim of breach of duty of fair representation would necessarily fail.

The foregoing interpretations can be supported by a number of considerations. Thus, as already noted, throughout the *Vaca* decision itself, there are numerous cases, cited with approval, holding that only where bad faith or hostility are present can a union breach its duty of fair representation. *See, e.g., Hardcastle* v. *Western Greyhound Lines, supra.* It would seem that if this Court intended to dispose of the requirement of bad faith in fair representation suits, thereby discarding all of the precedents which it cited with approval, it would not have done so in one cryptic phrase.

That bad faith is still a requisite element to a fair representation suit can be also gleaned from two other portions of this Court's opinion in *Vaca*. First, this Court noted that the Missouri Supreme Court erred in concentrating solely on the merits of Owens' grievance "regardless of the Union's good faith in reaching a contrary conclusion." 386 U. S. at 189-190. Second, this Court, consistent with a requirement of bad faith, refused to articulate any standard of due care in finding a breach of a

10. *Cf., Local 485, I. U. E.*, 170 NLRB No. 121 (1968); *Port Drum Co.*, 170 NLRB No. 51 (1968).

union's duty of fair representation for, as noted in *Vaca*, 386 U. S. at 192-193:

> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

The only other possible explanation for the phrase in question is that this Court meant to devise a hitherto unknown standard for breach of the duty of fair representation; to wit, that, even absent bad faith or hostile motivation, a course of conduct by a union that completely ignores employee complaints or simply goes through the motions in processing them runs afoul of its statutory duty. But, even assuming, *arguendo*, the applicability of such a standard, no breach could be found here; for, as is clearly borne out by the facts in this proceeding, the Union did not ignore the complaints of these Plaintiffs, nor did it perfunctorily process them. Rather, the Union resorted to numerous forums to obtain reinstatement of all employees.

Admittedly, the Union did not pursue the grievance procedure in seeking redress for six Plaintiffs. But, to utilize this single fact as the basis for a finding of breach of duty, is to read the language in *Vaca* in its most unintended sense. For, if one thing is clear from this Court's opinion in *Vaca* it is that the "wide range of reasonableness" accorded to unions in *Ford Motor Co.* v. *Huffman*, *supra*, applies not only to the negotiating table but also to the handling of grievances. And, under *Vaca*, this means that a "Union is permitted to exercise its discretion in

prosecuting grievances." *Watson* v. *International Brotherhood of Teamsters*, 399 F. 2d 875 (5th Cir. 1968). Surely, this "discretion," this "wide range of reasonableness," allows a union to by-pass the grievance procedure and pursue remedies in other forums which it honestly believes will be more effective.[11]

A contrary ruling, and the First Circuit's decision, buttressed by the jury instructions here, is such, has ominous implications. For example, unions have increasingly eschewed contractual grievance procedures and turned instead to the NLRB for redress, utilizing §§ 8(a)(5) and 8(d), in cases that are arguably subject to the contractual grievance procedure. *See, e.g., Joseph Schlitz Brewing Co.*, 175 NLRB No. 23 (1969). But, under these jury instructions and the holding in this case, such conduct would constitute a breach of the Union's duty of fair representation.

Curiously, the District Court never instructed the jury on the issue of perfunctory handling of grievances, except to note that "arbitrary means to act perfunctorily" (JA 246), which is, to say the least, rather circular. The only instruction on the issue of the Union's breach of its duty of fair representation was that (JA 245):

> "[The contract] provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with [contractual grievance procedures].
>
> ". . . the Union is not required to submit to the Company all grievances of its members relating to layoffs. *It is only required to submit such of those grievances which it regards as just grievances.*" (Emphasis added.)

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11. Notably, the NLRB has recently intimated that a union can discharge its duty of fair representation by seeking redress for grievances in forums other than the contractual grievance procedure. *Local 485, I. U. E.*, 183 NLRB No. 131 (1970); *Port Drum Co.*, 180 NLRB No. 90 (1970).

This instruction, which was objected to at length before both the District Court and the Court of Appeals, in effect, says that it is *per se* arbitrary and hence a breach of the Union's duty of fair representation not to process a grievance the Union believes has merit. And since the jury had been instructed that these grievances were "just" (JA 242), it was, in effect, duty-bound by the instruction to find that the Union breached its duty of fair representation.

The critical flaw in this instruction is that it entirely missed the central problem of this case. The question which had to be resolved was not whether the Union regarded these grievances as just, but rather whether the Union's resort to alternative avenues of redress, in the face of the repeated failures it encountered utilizing the grievance procedure and acting on the advice of counsel, amounted to arbitrary, capricious or whimsical conduct.[12] The Court's instruction, which, like the Missouri instruction overturned in *Vaca*, concentrated on the merits of the grievance, foreclosed any objective determination of this central issue since, as this Court noted in *Vaca v. Sipes*, 386 U. S. at 195, "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious."

Inexplicably, the Court of Appeals, while refusing to overturn the jury instructions, never grappled with them, but instead put its own gloss on the standard of arbitrariness in a footnote, which reads:

> "The defendant's argument that the charge erred in focusing solely on the Union's action in failing to process the grievances might have been well taken had there been any rational basis for relying solely on the NLRB proceeding."

12. The District Court defined "arbitrary" to mean "not governed by principle but acting according to preference, notion, whim or caprice." (JA 247.)

In so ruling, the First Circuit has now declared that since, as a matter of law viewed years later, the Union could not have obtained redress for these Plaintiffs in the forums it utilized, it therefore breached its duty of fair representation. In reaching this conclusion, despite what the Court conceded to be good faith motivation, the First Circuit has quite clearly equated honest mistake with a breach of duty; for in the context of good faith motivation and vigorous pursuit of redress, lack of a "'rational basis'' can only mean honest mistake. But, as already noted, such a standard was rejected by this Court in *Vaca*.

Moreover, it is hard to understand how the Court of Appeals ever reached this issue of "rational basis." The jury was never asked,[13] and indeed, from the instruction it was given, was effectively foreclosed from deciding whether there was a rational basis for the Union to believe that these dismissals would be covered by the National and Insular Board proceedings. More significantly, the jury was never asked the question of whether the Union in good faith believed that it had some rational basis for proceeding as it did; and, if the Union in good faith believed that these employees were indistinguishable from the hundreds of others that were dismissed, all having received identical dismissal letters, was there not a rational, non-arbitrary basis for reliance on the National and Insular Boards' processes?

Furthermore, the record is replete with evidence that the Union acted on advice of counsel[14] and honestly believed at the time that it could secure redress for these employees in the forums which it chose—a belief which was but-

13. A jury instruction to that effect was tendered by the Company, but rejected by the District Court (JA 241).

14. The parallel to *Vaca*, where the Union relied upon outside medical advice and was thereby insulated from a claim of breach of duty of fair representation, is striking.

tressed by the success enjoyed by the Union before the NLRB and the Insular Labor Board, and was shared by Plaintiffs themselves and by no less an authority than the Supreme Court of Puerto Rico. [15]

Finally, the Court of Appeals concluded that the Union did not breach its duty of fair representation vis-a-vis Plaintiff Elsie Lugo Bernier since it processed her grievance to impasse and the Court of Appeals thus dismissed her case. But, in concluding that the Union breached its duty to six other plaintiffs by not processing their grievances, the First Circuit reached an anomalous result. Its decision thus means that Plaintiffs in this case were not harmed by the Union's breach of its duty but are indeed better off, for had the Union processed these grievances through the grievance procedure, there is every reason to believe that these Plaintiffs would have fared no better than Elsie Lugo Bernier, and, in fact, the Court so stated.[16] Effectively, the Court of Appeals has found that the Union here breached its duty by not pursuing a remedy which was fruitless. This Court could hardly have intended that the doctrine of fair representation would achieve such absurd results.

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15. The action brought by the Union before the Puerto Rico Labor Relations Board was a § 301-type breach of contract action attacking all the Company's dismissals and seeking to compel compliance with contractual grievance procedures. Notably, in overturning the Insular Labor Board's cease and desist order, the Supreme Court of Puerto Rico was unable to discern whether employees were terminated as a result of subcontracting or automation. That tribunal expressed its opinion that all of the discharges and the questions of contract procedure related thereto, were "an inseparable part of the basic problem already under consideration by the National Labor Relations Board." (JA 355.)

16. The Court of Appeals held that "there was no evidence that but for the Union's conduct the Plaintiffs would have been reinstated or reimbursed at an earlier date."

2. The Remedy Found Appropriate in This Case Conflicts With Decisions of This Court and Raises Significant and Important Questions of National Labor Policy.

This Court has recognized numerous times the central role of the parties' grievance procedure in effectuating national labor policy. As was said by this Court in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionary Workers International*, 370 U. S. 254, 263 (1962):

> ". . . The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§203(d) of the Act, 29 U. S. C. § 173(d), 29 U. S. C. A. § 173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566, 80 S. Ct. 1343, 1345, 4 L. Ed. 2d 1403). . . ."

Indeed, the contractual issue presented by this case—the abilities of junior employees compared to senior ones—was one of the provisions at issue in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, 565-566 (1960). This Court held there, 363 U. S. at 568, 569:

> "The courts, therefore, have no business weighing the merits of the grievance, in considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.
>
> * * * * * * *
>
> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

For these reasons, both Defendants urged that remission of these grievances to the contractual procedure was an appropriate remedy in this case. The District Court, however, let the jury decide the underlying contractual remedy and, although noting the question of breach of contract was "a close one,"[17] and that the evidence adduced was "admittedly not so specific or precise as we should like," the Court of Appeals affirmed for all Plaintiffs except Rosa Figueroa.[18] But as this Court emphasized in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

> "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

If the ablest judge is incompetent to determine grievances, how can a jury's determination square with national labor policy?

The vice of having judges decide contractual issues is underscored by a portion of the Court of Appeals' decision

17. By the Court's own admission, the only evidence introduced by Plaintiffs on the issue relevant to contract violation was the testimony of a former supervisor, who had been one of the original Plaintiffs in the proceeding, and who (1) had been discharged seven months prior to Plaintiffs' terminations, during which time she had no opportunity to observe Plaintiffs' job performance or that of junior employees, and (2) relied heavily upon seniority standing as the basis for determining Plaintiffs' abilities in relation to those of junior employees.

18. Significantly, the First Circuit reviewed the merits of these grievances without reference to any arbitral authority, and the Court did not discuss the arbitral authority cited to it by Petitioner in its brief. This is contrary to the practice of the NLRB. *See, e.g., Local 485, I. U. E.*, 170 NLRB No. 121 (1968); *Port Drum Co.*, 170 NLRB No. 51 (1968).

which rejected as a "strained interpretation of the collective bargaining agreement" the Company's argument as to the procedural steps needed to be taken by an employee to process a grievance. But such an issue of procedural arbitrability is one specifically delegated to the arbitrator under this Court's decision in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 555-559 (1964). In not deferring to arbitration on such an issue, this decision is also in conflict with a recent Ninth Circuit decision reversing a District Court's handling of such procedural issues. *Bealmer* v. *Texaco, Inc.*, Docket No. 23,632, 125 Daily Labor Report A-8, A-9 (June 29, 1970) (9th Cir.). Similarly, the Court's treatment conflicts with the NLRB's approach. *Local 485, I. U. E., supra.*

As the Employer in *Drake Bakeries, supra*, was deprived of resort to the Courts when the Union did not repudiate the grievance procedure and denied it breached its contract, so too an appropriate remedy here, where the Company has not repudiated the grievance procedure and denies it breached its contract, is to direct that these grievances be processed through the grievance procedure. This is all the more appropriate remedy where the contractual question is, as here, "a close one," and since there is no showing of Union hostility, there is little doubt that the grievances will be prosecuted with vigor. Indeed, the NLRB has held that where a union has breached its duty of fair representation by not processing grievances, resort to the grievance procedure is the appropriate remedy, even though the Board could interpret the contract. *Local 485, I. U. E., supra; Port Drum Co., supra.*

While not laying down a blanket rule requiring arbitration, this Court noted in *Vaca*, 386 U. S. at 196, that "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is

proved." It is submitted that, in light of the dangers posed by not compelling arbitration here, arbitration is an appropriate remedy in this case. Further, the expanded definition of breach of the duty of fair representation provided by the First Circuit can only give rise to substantially increased litigation by disgruntled employees. Clearly, unless such claims are referred to arbitration, federal district courts could well become labor courts engaged in the wholesale litigation of contract disputes—a result hardly consistent with the thrust of this Court's decisions in the "Steelworkers Trilogy."

Finally, even assuming *arguendo* that the Courts below should have decided the contract and damage questions, the First Circuit erred in overturning the jury's apportionment of damages, an apportionment based upon clearly proper instructions (JA 248-249).[19]

The Court's apportionment of all damages against the Company, further, produces a shocking, inequitable result, given the facts in this proceeding. It should be noted that the Court attained this result despite its conclusions (1) that there was no evidence to indicate that the Company at any time frustrated the grievance procedure with respect to Plaintiffs; (2) that there was no evidence that but for the Union's conduct in failing to pursue the grievance procedure, "plaintiffs would have been reinstated or reimbursed;" (3) that plaintiff Elsie Lugo Bernier, for whom a grievance was unsuccessfully pursued, was entitled to no recovery from the Company; and (4) that the issue of adequacy of evidence to support a finding of contract violation by the Company vis-a-vis Plaintiffs "is a close one." Given these conclusions, the assessment of all damages

19. *See also, Local 485, I. U. E.*, 183 NLRB No. 131 (1970) and *Port Drum Co.*, 180 NLRB No. 90 (1970), where the NLRB assessed 100 per cent of the damages suffered by employees against the Union, even though such damages were occasioned by the employer's arguably wrongful discharge.

against the Company means, in effect, that a company which enters into a labor agreement providing a specific expedited[20] procedure for resolution of disputes can, simply because of the mistake of a union over whom it exercised no control, be forced years later to litigate highly questionable claims of contract violation in an entirely different forum, with the final result being that the company is forced to make restitution of all damages suffered during the intervening period. The absurdity of this result is heightened by the Court's agreement that, had the dispute resolution procedure been timely effectuated by the offending party, it is unlikely that any of the Plaintiffs would have recovered—a conclusion fully borne out by the fact that this is precisely what happened to Plaintiff Elsie Lugo Bernier.

3. The Court of Appeals Treatment of the Statute of Limitations Issue Raises Significant and Important Questions of National Labor Policy.

As already noted, this Court has repeatedly stated that national labor policy favors resort to contractually agreed upon grievance procedures, uniformity and the speedy disposition of labor disputes. *See, e.g., John Wiley & Sons, Inc.* v. *Livingston, supra; Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966). The Court of Appeals decision in this case, holding that the statute of limitations for a Union's breach of its duty of fair representation is different than for an Employer's breach of contract, runs counter to each of these three articulated goals of national labor policy.

As *Vaca* v. *Sipes, supra*, indicates, in actions such as the

20. The contract in issue here provided that grievances protesting termination had to be brought to the Company within three days following such action (JA 310).

one presented, the Union's and the Company's liabilities though separate, are inextricably bound and stem from "a single injury." Given then this intricate and interdependent relationship between the liability of Company and Union, it would be anomalous to have different statutes of limitation applied.

Not only would it be anomalous, such a result could seriously undermine the pervasive federal labor policy favoring arbitration as the exclusive means for resolving disputes arising under collective bargaining agreements. *See, e.g., United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). In situations where a union would be subject to a shorter statute of limitations period than an employer, as the Court of Appeals here found, and where it was presented with grievances that it would prefer a jury rather than an arbitrator to decide, all the union would have to do is "arbitrarily" refuse to process the grievances, have the employees bring the suit after the union's statutory limitation period has run and have the jury, as in this case, decide the contract question in a § 301 action. Such a ploy would be an effective way for a union, without risk of liability (for the Court of Appeals here rejected any damages against the Union) to subvert the arbitrator's favored role in providing final and binding resolution of collective bargaining contract disputes.[21]

Moreover, as indicated in Appendix G, over two-thirds of the jurisdictions covered by the National Labor Relations Act, have tort statutes of limitations far shorter than those applicable to actions based on either written or unwritten

21. The *quid pro quo* for the employee in such circumstances, which the First Circuit found "difficult to see," is apparent in this very case. Surely an employee of a large public utility might reasonably anticipate that he would fare better before a sympathetic jury than before an expert labor arbitrator in what the Court itself characterized as a close question of contract violation.

contracts. And so the danger posed by different statutes of limitations is very real. There is thus a need for uniformity here. As this Court noted in *Hoosier Cardinal*, 383 U. S. at 702:

> "The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."

The Court of Appeals noted this problem but held that it was up to Congress to enact a statute of limitations. In so holding, the Court abrogated its function of fashioning federal law consistent with national labor policy mandated by this Court's decision in *Lincoln Mills*, *supra*.

Further, given such insulation from liability, unions are encouraged not to process grievances, or to process them with an eye toward the statute of limitations. Such a result is at odds with the aim, articulated in *John Wiley*, 376 U. S. at 558, "of a speedy arbitrated settlement of the dispute."

Given all this, it is submitted that the only appropriate limitation periods for the contractual claim here are either the six-month period under § 10(b) of the NLRA, or the one-year period applicable to the Union. As for the former, since breach of a union's duty of fair representation is also an unfair labor practice, *Vaca* v. *Sipes*, *supra*, the six-month limitations period would prevent forum shopping by Plaintiffs and encourage the speedy disposition of such claims. And since, as noted previously, the question of breach of contract is intricately connected to the fair representation issue, and different limitations periods would seriously undermine national labor policy, the six-month period should also apply to the contractual claim. This result is particularly appropriate in light of recent NLRB

decisions indicating that, in passing upon claims of breach of duty of fair representation, the Board will also decide the merits of the underlying contract claim. *See, e.g., Local 485, I. U. E.*, 170 NLRB No. 121 (1968), 183 NLRB No. 131 (1970).

Alternatively, the same state limitations period should apply to both the Union and the Employer. Singularly inappropriate, however, is the statute of limitations period in this case which allow Plaintiffs over 14 years and 11 months to notify the Company, which has been willing to abide by the grievance procedure, of their contractual claims.

CONCLUSION.

For the foregoing reasons, Petitioner respectfully submits that its petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 385

PUERTO RICO TELEPHONE COMPANY,
Petitioner,

vs.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MORÉU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES, PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

Petitioner prays that this Court grant a rehearing of its order of October 26, 1970, denying the petition for a writ of certiorari and that a writ of certiorari issue to

review the judgment of the Court of Appeals for the First Circuit in the above-entitled case as prayed for in the petition filed July 13, 1970.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Admittedly, it could be suggested that it may be too soon after *Vaca* v. *Sipes*, 386 U. S. 171 (1967), to grapple with the difficult questions raised by that case. But a denial of certiorari here can only undermine the holding there by creating both litigation—under contractual grievance procedures and in courts under § 301, as well—and uncertainty as to the legal liability of both Employers and Unions flowing from a Union's good faith refusal to process a grievance to arbitration, issues, in large measure, supposedly laid to rest by *Vaca* and subsequent cases in other Circuits, but which, in light of the case at bar, were surely not. In summary, these issues are:

(1) Whether a Union breaches its duty of fair representation by failing to process grievances but instead pursues other remedies in complete good faith? At least three Circuits have indicated that only where hostility has been shown can a Union be held to have breached this duty; two clearly holding the standard of negligence applied by the First Circuit to be inappropriate. *See, e.g., Bazarte* v. *United Transportation Union*, 163 Daily Lab. Rep. A-3 (3rd Cir. 1970); *St. Clair* v. *Local Union No. 515, IBT*, 422 F. 2d 128 (6th Cir. 1969); *Hardcastle* v. *Western Greyhound Lines*, 303 F. 2d 186 (9th Cir.), *cert. denied*, 371 U. S. 920 (1962).[1] It is not difficult to see that the First Circuit's decision hampers Unions in screening and settling grievances with the concomitant flooding of the arbitration procedure and an influx of § 301 suits to contest the

1. Supreme Court Rule 19(1)(b) [conflict among the Circuits].

wisdom, rather than the motivation, of a particular decision not to take a case to arbitration.

(2) Whether an Employer which has concededly done nothing to frustrate the grievance procedure should be deprived of its contractual remedy, arbitration, because the other party to the contract made a good faith choice to eschew the grievance procedure and pursue other remedies instead? Even a moment's reflection indicates the serious tension between this case and this Court's decision in *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers Int'l.*, 370 U. S. 254 (1962).[2]

(3) Finally, the undermining of the grievance-arbitration procedure is complete with Unions and Employers having different statutes of limitations applicable, the limitation period of the Employer invariably longer, as here. Assuming the standard of negligence, it is not hard to imagine Unions promoting § 301 suits by "negligently" refusing to process close contractual cases, such as the ones presented here, the grievants then filing suit after the Union's limitations period has run. It is not enough for the First Circuit to "discount the likelihood while acknowledging the possibility, leaving it to Congress to enact some statute of limitations applicable to both employer and union," 425 F. 2d 281, 286, n. 6, when this Court has mandated courts to fashion law under § 301. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957). In applying different limitation periods and in suggesting that the matter was worthy of Congressional consideration, the First Circuit, at best, ignored this Court's mandate and, at worst, created a disruptive framework for the application of a workable national labor policy.[3]

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2. Supreme Court Rule 19(1)(b) [conflict with Supreme Court decision].

3. Supreme Court Rule 19(1)(b) [conflict with Supreme Court decision; important question of federal law].

CONCLUSION.

Certainly this Court has indicated on numerous occasions the primal role of the grievance-arbitration procedure in national labor policy. But the net effect of the First Circuit's decision here will surely be to hamper that procedure in that it penalizes Employers who are willing to abide by it and provides an incentive for unions not to process and resolve grievances promptly. And while it is no doubt fashionable for lawyers to conjure up visions of disaster resulting from every losing cause, we earnestly believe that if this decision is left intact it will return to haunt both this Court and the national labor policy which this case so clearly contravenes.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the First Circuit.

Respectfully submitted,

MATTHEW E. MURRAY,
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R. THEODORE CLARK, JR.,
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111 West Jackson Boulevard,
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(312) 431-9000,
Attorneys for Petitioner Puerto Rico Telephone Company.

Certificate of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to grounds certified in Rule 58 of the rules of this Court.

.....

Joel H. Kaplan,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 385

PUERTO RICO TELEPHONE COMPANY,
Petitioner.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

AND

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

MATTHEW E. MURRAY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

Now Comes Petitioner, Puerto Rico Telephone Company, and requests that this Court grant its Motion for Leave to File a Second Petition for Rehearing. In support of this motion, Petitioner states that:

1. Recent Court of Appeals decisions, rendered after Petitioner's Petition for Rehearing was denied, seriously conflict with the decision in this case, most particularly with the First Circuit's application of different statutes of limitation in a § 301 action to Employers and Unions. This directly conflicts with a Second Circuit ruling applying the same statute of limitations to both parties. Directly contrary to the First Circuit's conclusion here that the problems inherent in the simultaneous application of differing statutes of limitations were appropriate for Congressional resolution, the Second Circuit concluded that Courts under § 301 must fashion a national labor policy which precludes such disparate statutes of limitation.

2. A recent Sixth Circuit case conflicts with this decision on the question of what conduct constitutes a breach of the Union's duty of fair representation, specifically as to the necessity of a showing of hostility.

3. That denial of this Petition on these important questions of national labor policy can only cause serious disruption for both Employers and Unions.

Wherefore, Petitioner respectfully requests that this Court grant its Motion for Leave to File a Second Petition for Rehearing for the reasons stated above and in its Brief in Support of this Motion.

Respectfully submitted,

MATTHEW E. MURRAY,
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BRIEF IN SUPPORT OF SECOND PETITION FOR REHEARING.

Petitioner recognizes that a second petition for rehearing is unusual, but where a new and conflicting decision by another court of appeals has been rendered after a denial for rehearing, this Court has granted such a petition. *See, e.g., United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957). Such is the case here.

In *Abrams* v. *Carrier Corp.*, 75 LRRM 2736 (2d Cir. 1970), the Second Circuit, on facts completely analogous to those in the case at bar,[1] declared contrary to the First Circuit, on the issue of the applicable statute of limitations, 75 LRRM at 2750:

> "We therefore hold that when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims."

The First Circuit held that differing statutes of limitations were to apply to Employer and Union in such circumstances and that it is up "to Congress to enact some statute of limitations applicable to both employer and union." 425 F. 2d 281, 286 n. 6 (1st Cir. 1970). The importance of this question to a uniform national labor policy has been outlined in Petitioner's previous petitions before this Court and the necessity for this Court to decide this issue is now underscored by the conflicting decisions of the

1. Both *Abrams* and the instant case arose out of an alleged breach of contract by an Employer for its discharge of senior employees and its retention of junior employees and an alleged breach of the duty of fair representation by the Union in its failure to pursue these discharged employees' grievances.

First and Second Circuits, not only as to the appropriate limitations period, but also as to the appropriate forum, Court or Congress, to decide this question.

In addition, Petitioner has previously pointed to the serious conflict between the First Circuit and other Circuits as to the content of the Union's duty of fair representation. This conflict is highlighted by a recent decision of the Sixth Circuit, also rendered after the petition for rehearing, where it was held, contrary to the instant case, that "hostility, malice, or bad faith" are necessary allegations in a fair representation suit. *Dill* v. *Greyhound Corp.*, 248 Daily Lab. Report A-10 (December 23, 1970).

For the reasons set forth above and in its previous petitions, it is respectfully urged that this Court grant a rehearing of its order of December 7, 1970, denying the petition for a rehearing and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the First Circuit.

Respectfully submitted.

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Attorneys for Petitioner Puerto Rico Telephone Company.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to grounds certified in Rule 58 of the rules of this Court.

JOEL H. KAPLAN,
Attorney for Petitioner.

CERTIORARI DENIED N.C.R.